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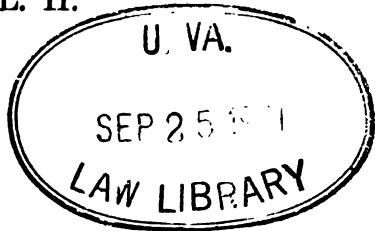
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BY

DAVID MACLACHLAN, M.A.,
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IN TWO VOLUMES.

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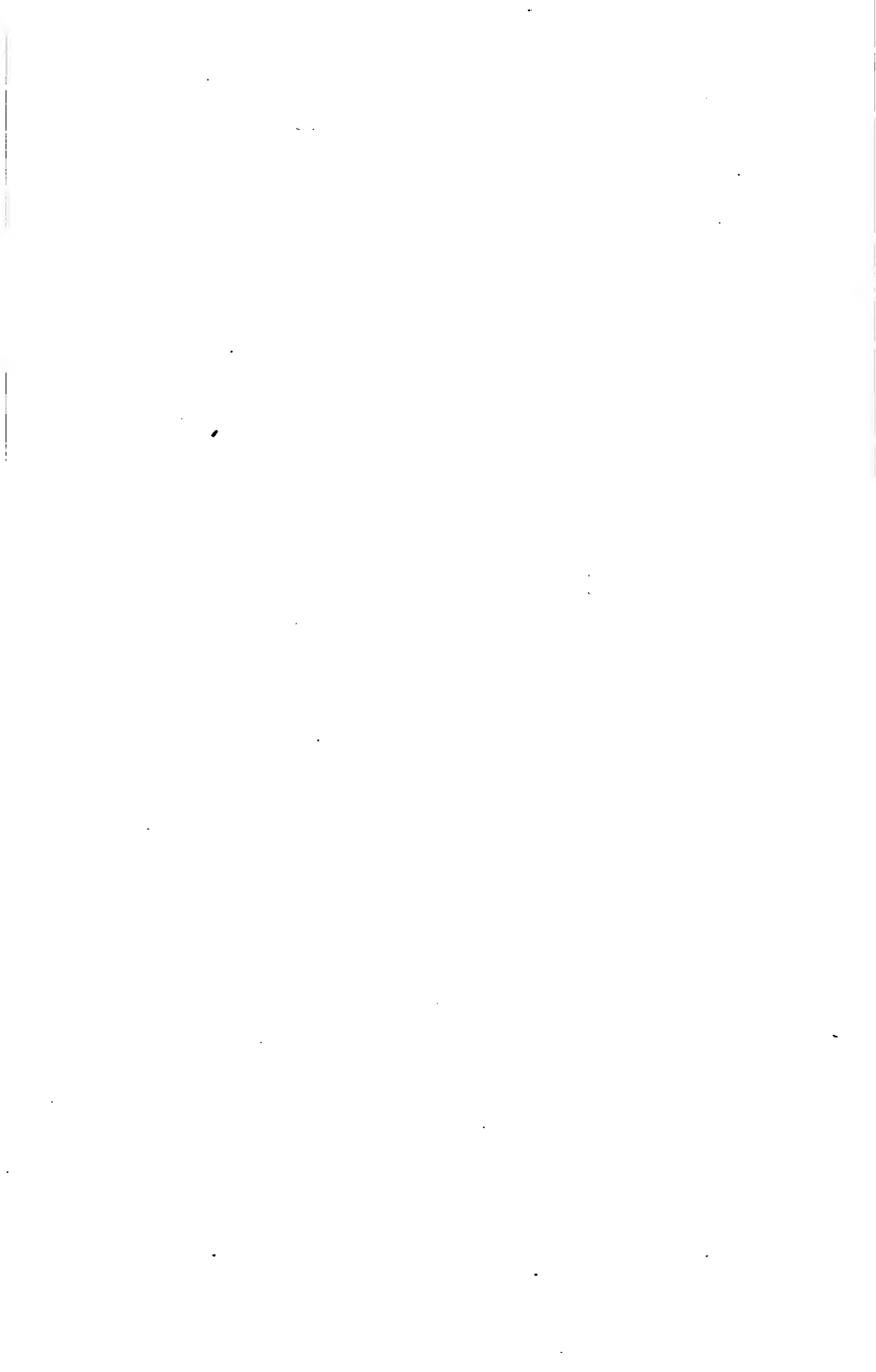
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CHAPTER III.

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AN express warranty is a stipulation inserted in writing on the face of the policy, upon the literal truth or fulfilment of which the validity of the entire contract is dependent. Principles of law applicable to express warranties.

These written stipulations either allege the existence of some fact or state of things at the time, or previous to the time, of making the policy,—as, that the thing insured is neutral property, that the ship is of such a force, that she sailed on such a day, or was all well at such a time; or they undertake for the happening of future events, or the performing of future acts,—as, that the ship shall sail on or before a given day, that she shall depart with convoy, that she shall be manned with such a complement of men, &c.¹

In the former case, Mr. Marshall terms the stipulation an affirmative, and in the latter a promissory warranty. But such a distinction between the two classes is one rather of

¹ Marshall, Ins. 353.

form than substance, many warranties that are in form affirmative, being, in fact, also promissory. For instance, a warranty that the ship is neutral not only affirms that she is so at the date of the policy, but also engages that, as far as depends on the assured, she shall continue neutral throughout the duration of the risk.

Must be
written on
the face of
the policy.

It is a fixed and long-established rule, that nothing can amount to an express warranty, *i. e.*, to an explicit condition, on the literal truth of which the validity of the contract depends, unless it be inserted in writing on the face of the policy.

For instance, a written paper that the ship "mounts twelve guns and twenty men," was held not to be an express warranty, though wrapped up with, and enclosed in, the policy, when brought to the underwriters for subscription;¹ and the decision was the same with regard to a similar paper, even though wafered to the policy at the time of subscribing.²

No matter
whereabouts.

But, to be an express warranty, it is not necessary it should be incorporated with the body of the policy; it suffices if it be on the face of the policy, in the margin or at the foot, and written either in the usual way or transversely.³ And yet there are cases in which, by distinct reference in the policy, that which is extrinsic to it will be considered as incorporated with the contract, and its literal fulfilment be as strictly enforced as though it were actually inserted in writing on the face of the instrument.⁴

¹ *Pawson v. Barnevelt*, 1 Dougl. 12 n.

² *Bean v. Stupart*, 1 Dougl. 11.

³ *Kenyon v. Berthon*, Dougl. 12 n.; *Blackhurst v. Cockell*, 3 T. R. 360.

⁴ *Pittegrew v. Pringle*, 3 B. & Ad. 514; *Graham v. Barras*, 5 B. & Ad. 1011. The rule was established in the older cases of *Routledge v. Burrell*, 1 H. Bl. 255, and *Wood v. Worsley*, 2 H. Bl. 574, and 6 T. R.

710; which were cases on fire policies. *Quære*, whether a clause of warranty indorsed on the back of the policy, unless signed by the initials of the parties, or referred to in the body of the instrument, would be operative; 1 Duer, 176;—Held, that it would not, in the case of a railway ticket: *Henderson v. Stevenson*, L. R., 2 H. of Lds. (Sc.) 470.

No particular form of words is requisite to constitute an express warranty, nor any special word such as "warranty" or "warranted." The words, "to sail on such a day," or "in port," or "all well" on such a day, or "carrying so many guns and so many men," &c., if written in the body, at the foot, or on the margin of the policy, would be of the same force and effect as the most formal clause.¹

No peculiar form of words requisite.

Moreover, express warranties are not solely to be found in special clauses. Words which to a careless reader might appear to be terms of mere description of the thing insured will amount to an express warranty—for instance, "a Danish brig," "the Swedish ship *Sophia*,"—that the subject insured has the national character thus ascribed to it in the policy. Thus, in a policy "on goods on board *The Mount Vernon*, an American ship," this description of the ship was held a warranty that she was an American ship, and carried with it the necessity of her being documented as American ships were bound to be by the treaties then subsisting between the United States and France.²

Nor special clauses.

Happily an attempt to push this doctrine to extremes by contending that the national language used in describing the ship's name in the policy—for instance, *The Three Sisters*, instead of the *Tres Hermanas*, or *The Mark Anthony*, instead of the *Marco Antonio*—was a warranty that the ship was of the same nation as the language thus used, was immediately and decisively repressed by Lord Ellenborough.³

Attempt to carry this to extremes.

It appears to have been held in the United States that the mere allegation of a fact in the policy is not a warranty, if it be clear from the terms of the policy itself that the fact alleged in the particular case can have no relation to the risk. In a policy "on the good British brig called *The John*," against sea risks only, this mere description of the ship was held there not to be a warranty that she was British,

¹ *Kenyon v. Berthon*, 1 Dougl. 12.

² *Clapham v. Cologan*, 3 Camp.

³ *Baring v. Claggett*, 3 B. & P. 201; *S. C.*, 5 East, 398; *Lothian v. Henderson*, 3 B. & P. 499.

382. So, *Dent v. Smith*, L. R., 4 Q. B. 414.

because that fact could not, on such a policy, have affected the underwriter's estimate of the risk.¹

Mr. Phillips considers this distinction well taken, if rigorously confined to cases of the same character.²

But, on the whole, it appears better to avoid entering in any case into the question of the materiality of the fact alleged; first, because it is a departure from what has hitherto been regarded as a fixed principle of decision with regard to Warranties as distinguished from Representations; and, secondly, because it calls upon the Court and jury to decide upon the impossibility of the underwriter being influenced by the fact thus alleged. Who, for instance, in the very case cited, could safely say that the underwriter might not have been more inclined to insure a British ship against sea risks than one of any other national character?

This, then, is the first great distinction between an express warranty and a representation—that the former is always, and the latter never, written on the face of the policy.

Requires an exact and literal fulfilment.

The second main distinction between them is, that while a representation may be satisfied with a substantial and equitable compliance, a warranty requires a strict and literal fulfilment. What it avers must be literally true; what it promises must be exactly performed.

Every policy, in fact, containing an express warranty is a conditional contract, to be binding, if the warranty is literally complied with, but not otherwise. In the language of Lord Mansfield, "The contract depends on the event taking place. There is no latitude, no equity; the only question is, has that event happened?"³ And again, "The warranty in a contract of insurance is a condition or a contingency, and unless that be performed there is no contract."⁴

Inquiry into the materiality or immateriality to the risk of the thing warranted is thus entirely precluded, and so are

¹ *Maekie v. Pleasants*, 2 Binn. 63. Ins. 375.

² 1 Phillips on Ins., no. 768.

³ In *Hibbert v. Pigou*, 1 Marshall, 343, 345, 346.

⁴ In *De Hahn v. Hartley*, 1 T. R.

all questions as to substantial compliance. "It is perfectly immaterial," says Lord Mansfield, "for what purpose a warranty is introduced, but, being inserted, the contract does not exist unless it be literally complied with." "The very meaning," says Ashurst, J., "of a warranty is to preclude all questions whether it has been substantially complied with: it must be literally so."¹ "It is a clear and first principle of insurance law," says Lord Eldon, "that when a thing is warranted to be of a particular nature or description, it must be exactly what it is stated to be. It is no matter whether material or not; the only question is, is this the thing *de facto* I have signed?"²

By breach of the warranty, therefore, although the loss may not have been in the remotest degree connected with it, the underwriter is none the less discharged on that account from all liability. A ship, warranted to sail with convoy, had in fact sailed without it and went down in a storm, the underwriter was nevertheless held not liable for the loss.³

Breach and loss need not be connected.

It is equally so where the warranty relates to a period antecedent to the risk insured, the breach of it, although remedied before the ship sails on the voyage insured, is fatal. A ship was insured on a slaving voyage "at and from Africa to her port or ports of discharge in the British West Indies," and a memorandum was inserted in the margin of the policy that the ship had "sailed from Liverpool with fourteen six-pounders, swivels, small arms, and fifty hands or upwards, copper sheathed;" the ship had actually sailed from Liverpool with only forty-six men, but within twelve hours afterwards she had taken on board at Beaumaris six additional hands; the Court unanimously held that it was a breach of an express warranty for the

¹ In *De Hahn v. Hartley*, 1 T. R. P. C. 255.
345, 346.

² Per Lord Eldon, in *Newcastle Fire Ins. Co. v. Macmorran*, 3 Dow's

³ *Hibbert v. Pigou*, 1 Marshall, Ins. 375.

ship to sail from Liverpool with only forty-six men, and the policy therefore was void.¹

The literal fulfilment is a condition precedent.

A question has been raised in the United States whether an express warranty is in all cases a condition precedent, so that its breach will always avoid the policy *ab initio*; or whether it has this effect only when it relates to the commencement of the risk.² Mr. Phillips, relying upon dicta of the Judges, gives the latter view as being the received law of the United States.³

Mr. Arnould, in the absence of any decision on the question in the English Courts, adopted and maintained the opinion that the contract, by breach of an express warranty, was rendered void *ab initio*, the effect of which would be that the assured could not after the breach recover a loss that had accrued before it. The high authority of Lord Mansfield may, it seems, be cited in favour of this view, for his language, already adduced for another purpose, appears, although not adverted to by Mr. Arnould, to be very pertinent to this: he says, "The contract depends on the event taking place;"⁴ and again, "The warranty in a contract of insurance is a condition or contingency, and unless that be performed there is no contract."⁵

Nothing excuses non-compliance.

No cause, no motive, no necessity, excuses non-compliance with an express warranty. A ship warranted to sail on a given day was prevented doing so by an embargo laid on by a British governor, and this breach of the warranty was held to avoid the policy, although the embargo came expressly within the words "restraints and detainments of kings, princes, and people," &c., which were perils expressly insured against in the policy.⁶

¹ De Hahn v. Hartley, 1 T. R. 343.

² Hendricks v. Comm. Ins. Co., 8 Johns. 1; Taylor v. Lowell, 3 Mass. Rep. 337, 340, 347. See 1 Phillips, no. 771.

³ 1 Phillips, Ins. no. 771.

⁴ Per Lord Mansfield, Hibbert v. Pigou, 1 Marshall, Ins. 375.

⁵ Per Lord Mansfield, De Hahn v. Hartley, 1 T. R. 345, 346. See the next case.

⁶ Hore v. Whitmore, 2 Cowp. 784.

Excuse of non-compliance with an express warranty is Except when. conceivable only in case—1. The state of things contemplated by the warranty were to cease; or, 2. A subsequent law should make compliance illegal.

Thus, if during war a warranty to sail with convoy at a future time from a foreign station were inserted, the intervention of peace before the period at which the ship was so to sail would probably be held to excuse the necessity of compliance.¹ So it is an old principle of law, that if a man covenants to do a thing which is lawful at the time, the covenant is repealed by an Act of Parliament which afterwards makes the doing of it unlawful.² The same rule extends to warranties. If, however, compliance with the warranty was unlawful at the time of making the policy, the contract was then void on the ground of its illegality.

A warranty is construed according to the understanding of merchants, and does not bind beyond the commercial import of the words. Thus, a warranty to carry "thirty seamen, besides passengers," was held to be satisfied, although only twenty-six mariners had signed the register, by adding in the steward, cook, surgeon, and some boys to make up the number; evidence being given that boys are included by mercantile usage under the term seamen, and the jury being of opinion that the word "seamen" in this policy meant persons employed in navigation, as distinct from passengers.³

A warranty will not be extended, by construction, to include anything not necessarily implied in its terms. Thus, where there was a warranty "that the ship should have twenty guns," and it appeared that, although, in fact, the ship had twenty guns, yet she had only twenty-five men, a number quite short of the necessary complement for twenty guns, Lord Mansfield held that this warranty did not imply

Construction of a warranty by mercantile usage.

Bean v. Stupart.

A warranty not to be extended by implication. Hyde v. Bruce.

¹ See Duer on Representations, pp. 89, 90.

² Brewster v. Kitchin, 1 Ld. Raym.

316, 321, S. C. reported as Brewster v. Kitchell, 1 Salk. 198.

³ Bean v. Stupart, 1 Dougl. 11.

that she should carry a competent number of men to work the guns; and therefore, as there was no ground to impute fraud, the warranty had been sufficiently complied with.¹ The tendency of the Courts is to adhere, as far as possible, to the plain meaning of the terms taken according to their natural construction; and therefore the Privy Council in construing a warranty against being in the Gulf of St. Lawrence between certain days named refused to follow the case of *Colledge v. Harty*.² In this latter case, a sea policy was effected subject to this rule: "Ships not to sail from any port to any port in the Belts, between the 20th of December and 15th of February," and the Court held, that the word "to" meant "towards," according to its general construction in sea policies, bills of lading, &c.³

Warranty of safety there and then, and occasional warranties.

"Well" on a given day.

Blackhurst v. Cockell.

When a policy warrants that the ship was "all safe," or "well," on such a day, the warranty is satisfied if the ship was "safe," or "well," at any time on the day in question. Goods were insured "lost or not lost," and at the foot of the policy was written "warranted well December 9th, 1784;" the policy was subscribed by the defendant between one and three o'clock in the afternoon of the day named in the warranty, and the ship had been lost at eight o'clock the same morning. "We are all of opinion," says Lord Kenyon, delivering the judgment of the Court, "that if the ship were well at any time on that day, it is sufficient, and that the defendant is consequently liable."⁴

"In port" on a given day.
Kenyon v. Berthon.

To the same effect is the operation of the warranty that the ship was "in port" on a given day; thus there was written transversely on the margin of the policy, "in port 20th July, 1776," and Lord Mansfield held, that this was a warranty that the ship should be in port on that day, and

¹ *Hyde v. Bruce*, 3 Dougl. 213; 1 Marshall, Ins. 354.

² *Provincial Ins. Co. of Canada v. Leduc*, L. R., 6 P. C. 224.

³ *Colledge v. Harty*, 6 Exch. 205; 20 L. J., Exch. 146.

⁴ *Blackhurst v. Cockell*, 3 T. R. 360.

as it was proved that the ship had sailed on the 18th of July, he held the policy void.¹

But, where a policy was effected on a ship against fire for one month, on the terms that she should be "safe moored in Portsmouth harbour" during the time, Lord Ellenborough held, that this policy was not avoided by the ship's being moved from one part of the harbour to another for the more convenient purpose of repairs, and taking in her cargo, she having been safely moored at every part of the harbour she was so moved to.²

In a time policy, where the *terminus à quo* is not mentioned, but the insurance is intended to cover the ship on any voyage during the time,—this warranty, "in port," will be satisfied by the ship's being in any port on the day specified. But, in policies "at and from" a given terminus, the general words "in port" must be construed as referring to the port where, under the policy, the voyage is made to commence, and the warranty will not be satisfied unless the ship was in that port on the specified day. Thus, where a ship was insured "at and from Hamburg to Vigo," with a warranty that she was "in port on the 19th October, 1825," and it appeared that the ship on that day was in the port of Cuxhaven, ninety miles below Hamburg, and also on the river Elbe, but beyond the limits of the port of Hamburg, Lord Tenterden held that this was not a compliance with the warranty; his Lordship remarking, that "if the assured had merely meant to stipulate that the ship was in port somewhere or other, as distinct from being at sea, on the day specified, he should, under such a form of policy, have warranted that the ship was 'all safe,' or 'well,' on the 19th of October."³

Distinction
between time
and voyage
policies.

Colby v.
Hunter.

The limit of the port of London for ships clearing outwards is at Gravesend; if, therefore, goods should be warranted as having been, or, to be exported from London on

Limits of
port.

¹ Kenyon v. Berthon, 1 Dougl. Selw. N. P. 1008.
12, note.

³ Colby v. Hunter, 1 Mood. &

² Clarke v. Westmore, cited in Malk. 81.

or before a given day, such warranty would not be satisfied, unless the ship had cleared out at Gravesend on or before the day.¹

Lawful trade. In the case of a ship insured "in any lawful trade," it has been held that the words "lawful trade" must be confined to trade on which the ship was sent by her owners; and therefore, that the assured on such a policy was not precluded, by this clause, from recovering for a loss occasioned by the ship's being barratrously employed by the master in the smuggling trade.²

It would be endless to attempt an enumeration of all the different kinds of stipulations which the varying exigencies of commerce may induce parties to introduce into contracts of insurance. In the United States, from the great number of their ports, and the great variety of their tribunals, the decisions upon the effect of such occasional clauses and peculiar stipulations have been proportionally numerous, and may be found collected by the indefatigable industry of Mr. Phillips.³

**Warranty as
to time of
sailing.**

One of the most important and most general of all express warranties is that which either alleges that the ship has sailed, or stipulates that she shall sail on, before, or after a given day.

In almost all voyages, the year for the purposes of insurance is divided into two periods of time; all risks commencing within one portion of the year being called winter risks, and those commencing within the other being called summer risks. Thus, for instance, in the West India trade, all risks commencing between the 12th of January and

¹ So decided on a licence to export, *Williams v. Marshall*, 6 Taunt. 390; 2 Marshall's Rep. 292. See also 2 Park, Ins. 692, 693.

² *Havelock v. Hancill*, 3 T. R. 277. Barratry was a peril expressly insured against by the policy; but

that would have been of no avail in case the Court had held there had been a breach of the warranty: *Hore v. Whitmore*, 2 Cowp. 784.

³ 1 Phillips on Ins., c. ix. s. 9. "On particular Warranties and Conditions."

the 1st of August are called summer risks; those commencing between the 1st of August and the 12th of January, winter risks. The amount of danger incurred in one of these periods is found by experience to be greater than in the other, and the amount of premium asked for insuring a winter risk is proportionately higher than for a summer risk.

When an insurance is "at and from" a port, the ship is protected during her stay at the port; in such policies consequently it becomes additionally desirable for the underwriter to limit his responsibility by fixing some definite day after which he will not be liable, unless the ship have actually sailed on her voyage.¹ For these reasons, in addition to the general doctrines of law touching warranties, the Courts have been exceedingly rigorous in requiring the most exact and literal fulfilment of the warranty to sail on, before, or after a given day.

We have seen that even an irresistible force, though one of the perils insured against, will not excuse non-compliance with this warranty, so as to enable the assured to recover for a loss happening after the day limited for sailing.²

For obvious reasons the end of the winter risk is to be as much desired as the commencement of that risk is to be avoided. A stipulation, therefore, that the ship shall sail after a given day and before another day, must be complied with quite as strictly as a stipulation to sail on or before a given day. A ship insured "at and from Martinique to Havre de Grâce, with liberty to touch at Guadaloupe," was warranted to sail after the 12th of January, 1778, and on or before the first of August, 1778:" the ship sailed from Martinique to Guadaloupe, long before the 12th of January, 1778, intending to return to Martinique; finding, however, a full cargo at Guadaloupe, she never did so, but sailed direct from that island to Havre. The policy was held void because the

"After" a given day.

Vezian v. Grant.

¹ Beckwith v. Sydebotham, 1 Camp.

² Hore v. Whitmore, 2 Cowp. 784.

ship had sailed from Martinique before the 12th of January, contrary to the warranty.¹

In case of an island.

Under a policy "at and from" an island, the whole island is considered as one *terminus à quo*, and the ship under the word "at" is protected in coasting round the island from port to port, nor is considered as having sailed on her voyage till she entirely clears away from the island with the purpose of proceeding directly for the *terminus ad quem*. Hence, where a ship, insured "at and from Jamaica to London," was warranted to sail, as in the last case, "after the 12th of January, and on or before the 1st of August;" and it appeared that the ship, directly she had finished her loading at Port Maria, in Jamaica, and before the 12th of January, sailed for Port Antonio, an accustomed rendezvous in the same island, intending to wait there for convoy, and was lost in going thither; it was held, that this sailing from port to port was not a sailing on the voyage within the meaning of the warranty, and therefore that, although before the 12th of January, it was no breach thereof.²

Cruickshank v. Janson.

Distinction between "to sail" and "to sail from."

Considerable nicety has been shown in determining, under the varying circumstances of different cases, whether a warranty to sail has been complied with; and the Courts have put a different interpretation on a general warranty "to sail" (without more), and on a warranty "to sail from," or "to depart from," a named terminus.

To sail.

First, with regard to the general warranty "to sail" on or before a given day, the general principle established by the cases is this:—If a ship, so warranted "to sail," quits her moorings on or before the day limited, being then perfectly ready to proceed on her sea voyage, and removes, though only to a short distance, with the *bonâ fide* intention of at once prosecuting such voyage, that is a sailing within the meaning of the warranty, although she may subsequently be detained till after the limited day by some unforeseen delay.

Rule.

¹ *Veizan v. Grant*, 1 Marshall, Ins. 359; 2 Park, Ins. 670, 671.

² *Cruickshank v. Janson*, 2 Taunt. 371.

If, on the other hand, the ship, at the time she quits her moorings and sets sail, is not in a state of complete preparation for her sea voyage, and is not *bonâ fide* intended to proceed directly and immediately upon it, this is not a compliance with the warranty. In short, in order to satisfy a general warranty to sail, there must be a *bonâ fide* commencement of the voyage insured, on or before the given day.

Under a policy "at and from" an island or a district containing several ports, if the ship, warranted to sail on or before a given day, quits her moorings and sails from any one of such ports on or before the day, in a state of complete readiness for her sea voyage, and with a real intention of proceeding directly upon it, her subsequent detention at another of such ports or on the coast of the island until after the given day will not amount to a breach of the warranty to sail, if such delay were accidental and unforeseen.

In case of an island.

The ship *Capel* was on the 20th August insured, "lost or not lost, at and from Jamaica to London, warranted to have sailed on or before the 1st of August." The ship, being completely laden and in every respect prepared for her voyage to London, sailed from St. Anne's Bay, on the north coast of the island of Jamaica, upon the 26th of July (before the day limited in the warranty), for Bluefields (an open roadstead on the south coast of the same island, and therefore out of the ship's direct course to England), in order to join convoy there, Bluefields being the general rendezvous for convoy on the Jamaica Station. At Bluefields on the 29th of July, convoy not being there, the ship was detained by an embargo, under order of government, till the 6th of August (after the day limited in the warranty), when she finally sailed with the convoy for England.

Bond v. Nutt.

Lord Mansfield and the rest of the Court of King's Bench were of opinion that the voyage homewards had begun from St. Anne's, and that the ship had sailed within the meaning

of the warranty, when she left St. Anne's Bay on the 26th of July.¹ "The great distinction," Lord Mansfield said, "was this, that the ship sailed from St. Anne's for England by the way of Bluefields, and that it was not a voyage from St. Anne's to Bluefields with any object or view distinct from the voyage to England. If the captain," said his Lordship, "had gone first to Bluefields, for any purpose independent of the voyage to England, to have taken in water or letters, or to have waited in hopes of convoy coming there, none being ready, that would have given it the condition of one voyage from St. Anne's to Bluefields, and another from Bluefields to England."²

*Thellusson v.
Fergusson.*

A French ship, insured "at and from Guadaloupe to Havre," and "warranted to sail on or before the 31st of December," sailed from Point à Pitre (her port of loading in Guadaloupe) on the 24th of October, being then completely loaded and provisioned, and duly cleared out for her voyage to France. By the greatest exertions she had sailed on the 24th in order to join a convoy advertised to sail on the 25th from Basseterre, a fort and open roadstead in Guadaloupe, lying directly in the course of her voyage to France. A condition had been inserted in her clearance from Point à Pitre, that she should pass by Basseterre, in order there to take on such government orders or despatches as might then be ready for Europe. The captain swore at the trial, that, when he sailed from Point à Pitre he expected to find a convoy at Basseterre, and to proceed immediately with it on his voyage without any interruption;—that had he arrived at Basseterre in the daytime, as he had expected to do, he did not mean to have dropped anchor there at all, but merely to have sent in his boat to take such despatches as might then be ready;—arriving, however, at night, and too late for the expected convoy, that his ship, contrary to his anticipation, was detained at Basseterre, by the orders of government, till the 10th of January.

¹ *Bond v. Nutt*, 2 Cowper, 601.

instance of this in the case of *Cruick-*

² See 2 Cowp. 608, 609. See an

shank v. Janson, 2 Taunt. 301.

Upon this state of facts Lord Mansfield and the Court of King's Bench unanimously held, that, as the voyage had been *bonâ fide* commenced when the ship sailed from Point à Pitre on the 24th of October, and was afterwards stopped by unforeseen accident at Basseterre, the warranty had been complied with.¹

A captain, at the time of sailing from his port of clearance, knew of an embargo, and sailed into it, but afterwards swore he thought the embargo was only meant to prevent ships from departing without convoy,—that he expected to meet with convoy on arriving at the place of rendezvous,—and that the embargo would thereupon immediately cease, and leave him to pursue his voyage the same day without interruption. The jury believing this evidence gave a verdict for the plaintiff; and the Court, on motion for a new trial, refused to disturb it; though they admitted that, if the captain, on sailing from his port of clearance, had expected and meant to wait for convoy, it would not have been a sailing on the voyage.²

Embargo expected, but explained.
Earle v. Harris.

Under a policy "at and from Surinam, and all or any of the West India Islands (except Jamaica) to London," with a warranty "to sail on or before the 1st of August," the ship sailed from Surinam, where she had cleared out, completely loaded and provisioned for the homeward voyage, before the day, and thence proceeded to Tortola, not out of her usual course to England, in order to join convoy, and finally sailed thence with convoy after the day. The Court held, that the ship had satisfied her warranty, by sailing from Surinam before the day. Lord Ellenborough said that as Surinam was proved to have been the ship's final port of loading, the case was the same, as though that place only had been mentioned in the policy as the *terminus à quo*, and one of the special jury stated that such was the construction universally put upon these policies in the city of London.³

Wright v. Shiffner.

¹ *Thellusson v. Fergusson*, 1 Dougl. 361. See also *Thellusson v. Staples*, and *Same v. Figou*, 1 Dougl. 366, in *notis*.

² *Earle v. Harris*, 1 Dougl. 357.

³ *Wright v. Shiffner*, 2 Camp. 247; *S. C.*, 11 East, 615.

State of the ship requisite to satisfy this warranty.

In all cases a warranty "to sail," means "to sail on the voyage insured," with the intention of at once prosecuting it, and in a state of perfect fitness and preparation for completing it, unless the voyage insured be such as to require a different complement of men or state of equipment in different parts of it. What will not satisfy such a warranty may be seen from the following cases.

"It is clear," says Lord Tenterden, "that a warranty to sail, without the word 'from,' is not complied with by the vessel's raising her anchors, getting under sail, and moving onwards, unless, at the time of the performance of these acts she has everything ready for the performance of the voyage, and such acts are done at the commencement of it, nothing remaining to be done afterwards."¹

Ridsdale v.
Newnham.

A policy "at and from Portneuf (a place on the St. Lawrence about thirty miles above Quebec) to London," contained a warranty "to sail on before the 28th of October." On the 26th of October, the ship dropped down the river from Portneuf, where she had completed her loading, to Quebec, the first place at which she could obtain her clearances, with a crew, which, though sufficient for the river navigation, was not so for her sea voyage across the Atlantic. She arrived at Quebec on the evening of the 28th, but did not complete her crew, nor obtain her clearances at the Quebec custom-house till the 29th, and did not actually leave the port of Quebec till the 30th; this was held not to be a compliance with the warranty.²

Pittegrew v.
Pringle.

A time policy was effected, subject to certain rules providing "that vessels should not sail to certain ports of British North America from ports in Ireland, after the 1st of September;" and "that the time of clearing at the custom-house should be deemed the time of sailing, provided the ship were then ready for sea." The plaintiff's ship, then

¹ In *Lang v. Anderdon*, 3 B. & Cr. 495, 499; *S. P.*, *Thompson v. Gillespey*, 5 E. & B. 209—a case of charter-

party.

² *Ridsdale v. Newnham*, 4 Camp. 111; *S. C.*, 3 M. & Sel. 456.

lying in the Ballyshannon river, under charter for Miramichi, in New Brunswick (a port within the terms of the rule), was cleared at the Sligo custom-house on the 29th of August, with all her stores and provisions on board, but only fifteen tons of ballast instead of fifty. This lack of ballast was to enable her to cross the bar of the river, and boats were waiting outside to complete the ballasting, which might have been accomplished before dark on the 1st. On that morning, however, the ship struck twice before she could cross the bar, and the master then put over to Killybegs, on the other side of Donegal Bay, to see what damage she had sustained; she was uninjured, and the ballasting was completed at Killybegs, but not till the 4th of September, and the ship did not finally sail till the 8th. The Court, on these facts, held, 1st, that the warranty not to sail after the 1st of September had not been complied with; and, 2ndly, that the ship, at the time she cleared out at Sligo, was not ready for sea.¹

By a time policy the ship was "warranted not to sail foreign after the time limited in certain club rules:" she was bound for the Bay of Fundy, from Dublin, and the last day for sailing, by the club rules, was the 1st of September; by another rule (No 9) it was declared that the time of clearing at the custom-house should be deemed the time of sailing, provided the ship were then ready for sea. On the 31st of August, the ship, then lying in St. George's Dock, Dublin, was cleared out at the Dublin custom-house, with a complete crew engaged, but an insufficient complement of men on board for the sea voyage. Early in the morning of the 1st of September, the ship, with the same incompetent crew on board, dropped down the river to the Pigeon Hole, and in the course of that day the whole crew came on board, but the wind being unfavourable, the ship did not sail from the Pigeon Hole, and quit the port of Dublin, till the morning of the 2nd of September. It was held, that the

Graham v.
Barras.

¹ Pittegrew v. Pringle, 3 B. & Ad. 514.

warranty not to sail after the 1st of September was not satisfied; and supposing the 9th rule to be incorporated by reference into the policy, that the ship was not ready for sea on the 31st of August, when she cleared at the custom-house, as she had not then a full crew on board.¹

Involuntary detention afterwards is of no effect.

If, however, the ship has broken ground on her sea voyage, and once got fairly under sail for her place of destination, on or before the day limited in the warranty, though she may have gone ever so little way, and afterwards put back from stress of weather, apprehension of an enemy in sight, or be stopped by an embargo, or be in any way afterwards involuntarily detained, yet, as there was a beginning to sail on the voyage insured on or before the day, the warranty will be held to have been complied with.²

It must be a *bond fide* proceeding on her voyage.

Great distance on her sea voyage is not necessary to prove compliance; at the same time she must have actually quitted her moorings, and broken ground, so as *bond fide* to have commenced the voyage insured.

Nelson v. Salvador.

Under a policy on sugars "at and from Tobago to London," with a warranty to sail on or before the 10th of August, the ship took out her clearances for London on the voyage insured on the 9th of August, and on the 10th had finally completed her loading and got her passengers on board. The ship was at that time moored in Tobago Bay by her bower anchor and a stream anchor, and there was no impediment to her sailing but the wind. The stream anchor was raised that day, some of the sails were set, and the vessel moved forward about thirty fathoms, by heaving in

¹ *Graham v. Barras*, 5 B. & Ad. 1011. With regard to the construction of the ninth rule, "The time of clearing at the custom-house to be deemed the time of sailing, provided the ship is then ready for sea," the whole Court, with the exception of

Littledale, J., held, that the word *then* must be referred to the time of clearing.

² Per Lord Mansfield, in *Bond v. Nutt*, 2 Cowp. 607. And see *Thellusson v. Fergusson* (there cited); *Earle v. Harris*, 1 Dougl. 357.

that quantity of the cable of the bower anchor; but when they were about to heave the bower anchor, the captain, seeing a heavy swell setting into the bay, desisted, fearful, if he departed that day, that he should be lost in getting out. Next morning, the 11th, she weighed, and finally left the port, having had no communication with the shore after the morning of the 10th. Lord Tenterden, however, held that this was not a compliance with the warranty.¹

Moreover, the quitting of her moorings on the day named must also appear to be with the *bonâ fide* intention of forthwith prosecuting the voyage, and not merely and solely for the sake of complying with the warranty.

A time policy was effected on the ship *Cyclops*, "warranted not to sail for British North America after the 15th day of August." She was lying in the custom-house dock, Dublin, chartered for a voyage to Quebec; and on the morning of the 15th, being then in all respects ready for sea, was cleared at the custom-house, and hauled out of dock into the river, for the purpose of proceeding on her voyage. The wind, however, was blowing so dead against the ship that no sail could be set; she was, nevertheless, warped down the river till the tide ebbed, when she grounded; next day, the wind still being right against her, she was warped down to a point beyond which her further progress, in that way, became impossible, and where she again took the ground at the ebb. On the 17th the wind shifted, and she immediately set sail and put out to sea on her voyage.

Cochrane v.
Fisher.

The Court said, the question turned on the intention of the captain. If he moved his vessel, not merely for the purpose of complying with the warranty, but also with the *bonâ fide* intention of placing her in a more favourable position with regard to the prosecution of her voyage, they thought such a movement would be in compliance with the warranty; but if the breaking ground and warping down was merely to comply with the letter of the warranty, it would not be a sufficient

¹ Nelson v. Salvador, Mood. & Malk. 309.

commencement of the voyage. The case went to a new trial as to the master's intention.¹

The second jury found that the master intended to put the ship in a better position for the prosecution of the voyage, and not merely to fulfil the warranty, and yet, that at the time when the ship quitted the dock, they knew it was impossible to go to sea that day. On this verdict, the Court of Exchequer gave judgment for the plaintiff, and the Court of Error affirmed their judgment, on the ground "that the facts clearly showed that the ship was in the prosecution of her voyage on the 15th of August, having on that day made a movement, though in the river, for the purpose of proceeding to sea, and over the sea, to North America."²

Ready for the first stage of her voyage.

It is no breach of this warranty, however, if the ship sail on or before the day specified in a state commensurate with her then risk, although not adequate to a different risk at a different stage of the voyage.

Bouillon v. Lupton.

A vessel insured at and from Lyons to Galatz, and warranted to sail on or before the 15th of August, started on her voyage from Lyons on the 24th of July with a river crew and captain, and without her masts, anchors, and other heavy articles. At Arles, on the 28th, she took on board her sea captain, and some of her sea-going crew, and did what was necessary to fit her for the voyage to Marseilles. There, on the 29th, she necessarily called for her licence, and, according to custom and convenience, otherwise prepared for the sea voyage, on which she sailed, after no unreasonable delay, on the 23rd of August. The condition in which she sailed from Lyons being necessary and proper to her river passage, the Court held, that she had sailed on or before the 15th of August on the voyage insured, within the meaning of the warranty.³

¹ *Cochrane v. Fisher*, 2 Cr. & M. 581; *S. C.*, 4 Tyr. 424.

² *Cochrane v. Fisher*, in error, 1 Cr. M. & R. 809; *S. C.*, 5 Tyr. 496.

³ *Bouillon v. Lupton*, 33 L. J. (C. P.) 37. See *Biccard v. Shepherd*, 14 Moo. P. C. 471.

We proceed now to notice those cases which have been decided on warranties "to depart" and "sail from."

Under a policy "lost or not lost, at and from Memel to her port of discharge in England, warranted to depart on or before the 15th of September." *The Neptunus*, having completed her loading, and cleared at the custom-house of Memel on the 9th of September, in a state of perfect readiness for her voyage, hove up her anchor, and dropped down the river, with the intention of at once proceeding to sea; a change of wind, however, obliged her to lie to at a place in the river, still within the limits of the port of Memel, till the 21st, when she finally got to sea. Lord Ellenborough, at the trial, held that a warranty "to depart on or before the 15th of September, must mean that she should be out of the port of Memel and at sea by the given day, but she was still in that port on the day, and, therefore, the warranty was not complied with."¹ The Court of King's Bench supported this ruling;² and in another action on the same policy in the Court of Common Pleas, the unanimous judgment of that Court was given in the same way.³

A warranty "to sail from" receives precisely the same meaning as the warranty "to depart;" this was admitted in the following case, the only question being as to what in mercantile usage were the limits of the port of departure, with reference to ships of the burden of the ship insured.

A policy was effected on goods "by ship or ships" at and from Demerara to London, warranted to sail from Demerara on or before the 1st of August. Goods under this policy were shipped on board of a vessel of small burden, then lying in the river of Demerara, opposite the town, such being the proper usual place of loading and clearing out for ships of her tonnage. On the 1st of August the ship had loaded, cleared, unmoored, and dropped down the river to a place

"To depart"
and "to sail
from."

*Moir v. Royal
Exch. Ass.
Co.*

*Lang v.
Anderdon.*

¹ *Moir v. Royal Exch. Ass. Co.*, 4 Camp. 84.

² *S. C.*, 6 Taunt. 240, and 1 Marsh. R. 570.

³ *S. C.*, 3 Maule & Sel. 461.

beyond its mouth. It appeared that in the case of large vessels part only of their cargo is taken on board at the river anchorage, and that they neither complete their loading nor obtain their clearances until they get outside a shoal which commences about three miles beyond the river mouth. The ship in question did not get to the outside of this shoal till the 3rd of August, and soon after this was lost. Abbott, C. J., and the Court of King's Bench held, upon this evidence, that as the ship was of small burden, she must be considered, according to the usage of the place, as having "sailed from Demerara" on the 1st of August, within the meaning of the warranty.¹

*Baines v.
Holland.*

Under a policy on ship "at and from New York to Quebec, during her stay there, and thence to the United Kingdom, the said ship being warranted to sail from Quebec on or before the 1st of November," the Court held the underwriters liable for the loss of the ship while on the voyage between New York and Quebec although after the 1st of November; the warranty applying only to the part of the voyage between Quebec and England, and not to the part between New York and Quebec.²

Warranty to
sail with
convoy.

As to the warranty to sail with convoy, it does not appear necessary to state in detail the cases decided under the expired Convoy Acts. The following is an enumeration of the five requisites established by the authority of these cases, as being essential to a sailing with convoy:—1. It must be with the regular convoy appointed by government; 2, from the place of rendezvous appointed by government; 3, it must be convoy for the voyage; 4, under proper sailing instructions received from the officer in command; and, 5, she must depart with convoy, and continue with it till the end of the voyage, unless separated by necessity.

¹ *Lang v. Anderdon*, 3 B. & Cr. 495.

² *Baines v. Holland*, 10 Exch. Rep. 802; 24 L. J. (Exch.) 204.

During maritime war it becomes important for underwriters to ascertain whether the ship or goods insured are liable to capture; and, to avoid this risk, it is customary where it is proposed to insure as neutral, for the underwriters to require a warranty of the ship or goods as neutral property. This is usually effected by inserting in the policy the words "warranted neutral," or "warranted neutral property," or sometimes without any formal clause of warranty, by describing the ship or goods as of a neutral nation, *e.g.*, "an American ship," "a Dane," "a Swedish brig," &c., which we have already seen is held, when the circumstances of the time give it such significance, to have the same effect as any more formal clause of warranty.¹

Warranty of
neutrality.

The meaning of a warranty of neutrality is not only that the ship or goods are neutral-owned at the time the policy is effected, but that, as far as depends on the conduct of the assured or his agents, they shall continue neutral with a view of being protected on the voyage, and, consequently, that the ship shall be navigated according to the law of nations. This involves her being furnished with all the documents and papers which are the evidences of neutrality, and her observance of the regulations of those international treaties to which she is bound to conform.²

Meaning of
warranty of
neutrality.

If, at the time the policy is effected, the ship or goods be not owned by persons either, politically speaking, the subjects of a neutral country, or having the commercial character of subjects of such country; or if the ship be not properly documented as a neutral ship,—this is a breach *ab initio* of the warranty of neutrality.³ So also, if, in the course of the voyage, the ship violate the laws of blockade, or resist the

Instances of
breach.

¹ Ante, p. 601; *Baring v. Claggett*, 3 B. & P. 201; *Lothian v. Henderson*, *ibid.* 499; *Baring v. Christie*, 5 East, 398.

² 1 Marshall, Ins. 410; 1 Phillips, Ins. no. 783.

³ *Baring v. Claggett*, 3 B. & P. 201.

right of search, or in any other way conduct herself so illegally as to forfeit her character of neutrality, this is equally a breach of warranty, which frees the underwriter from all liability on the policy.

Assured undertakes only for things within his control.

A warranty of neutrality, however, only means "that things beyond the control of the assured stand so at the time, not that they shall continue so." If, for instance, at the time the policy is made, the property warranted neutral be really owned by neutrals, it is no breach of warranty if these parties become belligerents by the subsequent breaking out of hostilities between the state of which they are subjects, and any country other than that in which the policy is made. The assured warrants that the ship and cargo are neutral when the policy is effected. The risk of future war is undertaken by the underwriter.¹ The assured, indeed, pledges himself that the neutrality of the ship during the risk shall not be forfeited by any acts or omissions of himself or his agents.

Breaches of the warranty.

All property warranted neutral must, at the commencement of the risk, be, and as far as depends on the assured or his agents must continue till the end of it to be, neutral-owned,—the property, that is, of those who either by birth or domicile are for commercial purposes neutrals.²

What constitutes neutral ownership.

Having elsewhere discussed the question as to what constitutes neutrality for commercial purposes, it will be sufficient in this place shortly to recapitulate the principal points as to neutral ownership.³

Domicil.

The great principle is, that all men take their commercial

¹ *Aubert v. Gray*, 3 B. & S. 163, 169.

In case the hostilities supposed were to arise between the governments of the assured and of the insurer, the policy is rendered void not on the ground of a breach of warranty, nor by any principle of the law of nations, but by the war policy of the country of the insurer which, *ipso facto*, an-

nuls his contract. Early cases in which the underwriter was under such circumstances held liable, must now be considered as overruled: *e.g.*, *Eden v. Parkinson*, 2 Dougl. 732a; *Saloucci v. Johnson*, 2 Park. Ins. 716; *Tyson v. Gurney*, 3 T. R. 477.

² *Woolmer v. Muilman*, 1 W. Bl. 427; *S. C.*, 3 Burr. 1419.

³ *Ante*, p. 138.

character from the place of their domicile. "All persons who reside and carry on business in a country, reaping the advantages of its trade, and contributing to its well-being, must, for the purposes of trade, be considered as belonging to that country."¹

Thus, where a ship, "warranted American," belonged at the time of making the policy to a man who, though an American born, had married an English woman, settled his family in England, was navigating vessels between England and America, and for the preceding three years, 1797—1800, had resided with his family in this country; the Court held that this ship, though documented as an American, was not in fact American-owned within the true meaning of the warranty, and was consequently liable to capture as an English ship.²

Tabbs v.
Bendelack.

On the other hand, property belonging to the native subject of a belligerent state will be considered as neutral-owned, within the meaning of a warranty of neutrality, if its owner be residing and carrying on his trade in a neutral state at the time the policy was effected.³

It has been solemnly decided, however, in the United States, and no doubt would be so held in this country, that a man cannot acquire a neutral character for the purposes of commercial protection, or so as to make his property neutral property, by leaving a hostile and establishing himself in a neutral country, *flagrante bello*.⁴

Immigration
flagrante bello.

Wherever a man may reside and whatever political

¹ Per Lord Kenyon, in *Tabbs v. Bendelack*, 3 B. & P. 207 n.; 4 Esp. 109.

² *Tabbs v. Bendelack*, 4 Esp. 207; *S. C.*, 3 B. & P. 207, note;—a strong case, as it appeared that the plaintiff had an *animus revertendi* to America in that very ship on the termination of her then voyage. See also *Wilson v. Marryatt*, 8 T. R. 31; *M'Connell v. Hector*, 3 B. & P. 113; *The Indian Chief*, 3 C. Rob. Ad. R. 12; *The*

Anna Catherina, 4 C. Rob. Ad. R. 107; *The President*, 5 C. Rob. Ad. R. 277.

³ *M'Connell v. Hector*, 3 B. & P. 113; *The Emanuel*, 1 C. Rob. Ad. R. 249.

⁴ *The Dos Hermanos*, 2 Wheaton, 76; at least until by such a lapse of time his hostile character had been purged, and a new domicile had been acquired.

Establishments in different countries.

character he may have by birth, whether enemy, neutral, or ally, yet if during war time he keeps up a commercial establishment in a hostile country, all property connected with such commercial establishment is liable to hostile capture, because it is not neutral within the meaning of the warranty of neutrality.¹

If he that carries on business both in the belligerent and in the neutral country resides in the latter, then whatever may be his national character by birth, his property connected with his trading establishment in the neutral country is neutral for all the purposes of protection against hostile capture, and therefore within the meaning of the warranty.²

Property not wholly neutral owned.

It has been decided in the United States, and apparently on sound principles of law, that under a warranty of neutrality the property must be wholly owned by neutrals, and, if a belligerent be interested in any part thereof, though it be as *cestui que trust*, this falsifies the warranty.³

Property in transit.

If the property which is the subject of the insurance be in transit or in a course of consignment from a vendor to a vendee, it is not enough, in order to satisfy a warranty of neutrality, that the property be neutral-owned at the commencement of the transit, for if it be consigned by neutral owners to a hostile destination in pursuance of a contract made during war, it is liable to hostile capture while in transit. The hostile nature of its destination affects its character from the commencement, and works a forfeiture of its neutrality.⁴

It makes no difference if it be agreed between the neutral

¹ The *Vigilantia*, 1 C. Rob. Ad. R. 1; The *Susa*, 2 C. Rob. Ad. R. 251; The *Portland*, 3 C. Rob. Ad. R. 41. The rule is the same in the United States:—The *Indian*, 2 Gallison's Rep. 268; The *Antonia Joanna*, 1 Wheaton, 159.

² The *Portland*, 3 C. Rob. Ad. R. 41; The *Herman*, 4 C. Rob. Ad. R. 228; The *Jonge Klassina*, 5 C. Rob.

Ad. R. 297.

³ *Murray v. United Ins. Co.*, 2 Johnson, 168, cited 1 Phillips, no. 790; and see also *Galbraith v. Gracie*, *Condy's Marshall*, 388, note.

⁴ The *Sally*, 3 C. Rob. Ad. R. 300, note; *Vrow Margaretha*, 1 C. Rob. Ad. R. 336; The *Jan Frederick*, 5 C. Rob. Ad. R. 128.

consignor and the belligerent consignee that the goods shall be at the risk of the former till delivered;¹ such agreements being held fraudulent, and necessarily so, as they would cover all belligerent property while on the high seas.²

On the other hand, goods which are enemy-owned at the commencement of the transit, do not acquire a new character by a neutral destination; the principle assumed in this case being, that property which has a hostile character at the commencement of the risk cannot change that character while it is in transit, so as to protect it from capture.³

The rule in short was, that if either neutral goods were shipped with a hostile destination, or hostile goods with a neutral destination, by virtue of any contract made during war, both alike were, by the law of nations, as understood in this country before the Declaration of 1856, liable to hostile capture, and neither, therefore, were neutral within the meaning of a warranty of neutrality.

A hostile origin impresses its character upon the natural produce of the soil, so much so that although it were cropped from the plantation of a neutral, himself domiciled at the time in a neutral country, it was in its transit by sea during war liable to hostile capture;⁴ and the same consequence follows if it was contracted for by a neutral in contemplation of war;⁵ unless it were also delivered before

Want of
neutral
origin.

¹ The Atlas, 3 C. Rob. Ad. R. 299.

² The Courts in New York dissent from this rule altogether, and their judges have declared it to be rather "a rule of political expediency than of international law"; *De Wolff v. New York Firemen's Ins. Co.*, 20 Johnson, 214; *S. C.*, in error, 2 Cowen's Rep. 56. It should be stated, however, that Mr. Phillips lays down the law as in the text; merely stating this case, by the way, as existing; 1 Phillips, no. 260, 791,

ed. 1867.—Experience of the necessities of war dissipates doubts where formerly in a state of neutrality they seemed insuperable.

³ The Sally, 3 C. Rob. Ad. R. 300; The Atlas, *ibid.* 299; The Anna Catharina, 4 C. Rob. Ad. R. 107, 113. See MacLachlan on Shipp. 560.

⁴ The Phoenix, 5 C. Rob. Ad. R. 20; per Lord Stowell, *ibid.* 167.

⁵ The Rendsborg, 4 C. Rob. Ad. R. 121; The Jan Frederick, 5 C. Rob. Ad. R. 128.

the declaration of war, in which case it is held to be neutral.¹

Aliter, if last shipped from a neutral port.

If, however, the produce be owned by a neutral, and be imported from the hostile colony into a neutral country, it is neutral during its subsequent transit upon re-exportation.

The question in such cases always was, whether there had been a *bonâ fide* importation by the neutral into his own country, or whether the whole transit from the colony to the mother country was not one entire voyage. If such produce had been brought into the ports of a neutral country and there transhipped immediately on arrival, without being landed; this, especially in the absence of any distinct proof as to the hostile origin of such produce, was held enough to satisfy a warranty of neutrality.² *A fortiori* if landed, and duties paid on it at the neutral port previous to transshipment; that was held sufficient to legalize the transaction;³ but merely touching with such produce at the neutral port, and there paying a nominal duty, was not enough.⁴

Not documented as required by law.

In order to be neutral within the meaning of the warranty, so as to be protected against hostile capture, the ship must be furnished with all those documents and proofs of the neutral character of herself and her cargo required to be on board, either by the law of nations, or by the regulations of international treaties.

The principal documents and proofs of neutrality required by the law of nations in every neutral ship are the following:

The flag.

1. The *flag*: this is the most obvious badge of the national character of the ship, and by the law of nations she is liable as against herself to be considered as belonging to the nation

¹ The *Vrow Anna Catharina*, 5 C. Rob. Ad. R. 161.

³ The *Polly*, *supra*.

² See *Berens v. Rucker*, 1 W. Bl. 313; The *Polly*, 2 C. Rob. Ad. R. 361.

⁴ The *Essex*, 5 C. Rob. Ad. R. 369; The *Maria*, *ibid.* 365; The *William*, *ibid.* 385.

so indicated.¹ A ship warranted neutral must bear no other than a flag that was neutral at the commencement of the risk; and if warranted of any given national character must bear the flag of that and of no other nation.

2. The *passport, sea brief, sea letter or pass*: this is a certificate granted by authority of the neutral state, giving permission to the master of the ship to proceed on the voyage proposed, and declaring that while on such voyage the ship is under the protection of the neutral state.² It is indispensable to the safety of a neutral ship;³ and no vessel is permitted to disown the national character therein ascribed to her.⁴

The passport
or sea letter.

The form of it is frequently and variously given in the commercial treaties contracted between different states, and must therefore vary in each particular case. Usually it specifies the name and residence of the captain; the name, property, description, tonnage, and destination of the ship; the nature and quantity of the cargo; the place from whence it comes; its destination, &c. But no general rule can be laid down on these points.

In New York, owing, apparently, to the language of one of their statutes, which assumes the distinction, a difference has been held to exist between a passport and a sea letter, the latter term being confined to a mere certificate of ownership,⁵ but, generally speaking, both terms have the same import.

3. The *register or certificate of registry* is also an important document under this warranty, as it shows to whom and to

The register
or certificate
of registry.

¹ The Success, 1 Dobson, 131; The Vrow Elizabeth, 5 C. Rob. Ad. R. 2. It must be carefully borne in mind that it is only the ship which thus takes its national character from the flag or pass, not the goods; The Vreede Scholtys, 5 C. Rob. Ad. R. 5, note.

² The Vigilantia, 1 C. Rob. Ad. R. 1; The Vreede Scholtys, 5 C. Rob. Ad. R. 5, note.

³ Marshall, Ins. 410, citing Hubner de la Saisies des Bâtimens neutres, Part II. c. 3, s. 10, vol. i. p. 242.

⁴ The Vigilantia, 1 C. Rob. Ad. Rep. 1. This does not apply to the goods; The Elizabeth, 5 C. Rob. Ad. Rep. 2; The Vreede Scholtys, ibid. 5.

⁵ Sleght v. Rhinelander, 1 Johnson, 192; Sleght v. Hartshorn, 2 Johnson, 531, cited 1 Phillips, Ins. no. 805.

what port a vessel belongs, and, being certified by some officer of the customs, bears with it a certain stamp of public authority. This document, however, is not indispensable to compliance with the warranty, if the ship possesses others from which her neutral character may be decisively ascertained. So it was held in the United States, where the ship had a sea letter but no register.¹

Bill of sale.

4. The *bill of sale* may also be of importance, as a proof of nationality, especially where the ship appears to be of hostile build, in order to show that, although she be so, yet she has been either purchased by the neutral before, or captured, and legally condemned and sold to the neutral after, the declaration of war.²

The muster-roll.

5. The *muster-roll* (*rôle d'équipage*), or ship's articles, may be a document of great use in ascertaining a ship's national character, as it contains, not only the names, ages, &c., but also the place of birth of every person of the ship's company.³ For British ships this document was formerly of more decisive effect, when our ships were necessarily manned by native crews.

The charter-party.

6. The *charter-party*, as it serves to authenticate many of the facts on which the proof of neutrality must rest, ought always to be found on board chartered ships.⁴

The log-book.

7. The *log-book*, if faithfully kept, is important with the same view; and so is—

The bill of health.

8. The *bill of health*, which is a certificate, properly authenticated, that the ship comes from a place where no infectious distemper prevails, and is thus incidentally evidence of ownership.

Proofs of the national character of cargo.

9. Proofs of the national character of the cargo, as *invoices*, *bills of lading*, *certificates of origin*, &c.,—these are all of importance, as proofs of the neutral character of the goods warranted neutral. The certificate of origin was generally

¹ *Barker v. Phoenix Ins. Co.*, 8 Johnson, 237, cited 1 Phillips, Ins. no. 806.

C. Rob. Ad. R. 155; *Marshall, Ins.* 441.

² *Ibid.*

³ Per Lord Stowell, *The Sisters*, 5

⁴ *Supra*, note 2.

deemed necessary during the continuance of the French wars, in order to prove that the goods were the subject of legal transport.

All in fact, that the warranty of neutrality requires in respect of the property is that the ownership be in compliance therewith and be accompanied with the usual evidence of such neutrality as is warranted.¹

These principles derived from the general law of nations, are also applied to the regulations introduced by the commercial treaties of more recent times. For instance, by the treaty of 1778 between France and America, it was agreed that ships belonging to either state "must be furnished with sea letters or passports," (to be made out in the form annexed to the treaty,) "expressing the name, property, and build of the ship, as also the name and place of habitation of the master or commander."

Documents
required by
commercial
treaties.

A ship insured "from London to Guernsey, and from thence to the coast of Africa," &c., "warranted American property," while this treaty was in force had sailed from London to Guernsey without any passport, but from Guernsey, and until she was captured by a French privateer, she had such passport on board, and exhibited it to the captain of the privateer at the time of her capture. Lord Kenyon and the Court of King's Bench held, that although the ship was not lawful prize, yet the warranty of neutrality was broken, by sailing from London to Guernsey without a passport. "The ship," said Lord Kenyon, "under this warranty, was not only not to be liable to risks, arising from her not being American property, but she was not to be liable to any inconvenience or impediment arising from her not being in the condition required by the treaty with France."²

Rich v.
Parker.

As by this same treaty the *sea letter* is required to express

Baring v.
Claggett.

¹ Siffkin v. Lee, 2 B. & P. N. R. 484. See 1 Marshall, Ins. 412; 1 Phillips, Ins. no. 802. ² Rich v. Parker, 2 Esp. 615; S. C. 7 T. R. 705, 709.

"the name and place of habitation of the master or commander," therefore, where it ran thus:—"Permission has been granted to George Dominic, master of the ship called *The Mount Vernon*, of the town of Philadelphia, of the burden of," &c., the Court held that the name of the town here must necessarily, from its collocation, be referred to the ship, and not to the master; and that the warranty of neutrality was not satisfied, as the ship had not a *sea letter* such as is required by the treaty.¹

In the same case, as it appeared that the owner of the ship had not been naturalized in America, and his ship consequently had not acquired the privileges conferred upon registered ships of the United States by the American Navigation Act of 1792, the Court held, that the ship on this ground also was not "American," within the meaning of the warranty.²

The rule under consideration does not apply to those marine regulations and ordinances which foreign states take upon themselves to make in time of war, contrary to or beside the law of nations. Neutrality is a question upon the general law of nations, subject only to such modifications as may have been introduced by treaties between the state to which the ship belongs and other powers. The warranty of neutrality imposes no obligation on the neutral shipowner to furnish himself with every document that the belligerent powers may require by their own private ordinances, unsanctioned by international treaty, as evidences of neutrality. In no case, therefore, will the want of such documents amount to a forfeiture of his neutrality.³

¹ *Baring v. Claggett*, 3 B. & P. 201 (before Lord Alvanley); and *S. C.* in error, 5 East, 398 (before Lord Ellenborough).

² *Baring v. Claggett*, 3 B. & P. 201. Kent, C. J., supposes that Lord Alvanley did not know of the Act of Congress of 1802, giving vessels not entitled to a register, but American owned, all the advantages of national

protection; 1 Phillips on Ins. no. 813, note. He certainly did not; for *Baring v. Claggett* was only decided in 1802, and the ship which was the subject of the warranty had been captured six years before, in 1796.

³ *Mayne v. Walter*, A.D. 1782, before Lord Mansfield, 1 Marshall, Ins. 402, and the remarks of the same author on that case, and Barzillay

A warranty of neutrality implies that the ship shall be conducted on the voyage with strict regard to the rules of neutrality. She is not to be guilty of any conduct which by the rules of war renders her liable to hostile capture.

What is implied in a warranty of neutrality.

Therefore, engaging in the privileged colonial or coasting trade of the enemy—simulating or destroying papers—resisting the right of search—violating the laws of blockade—are all so many forfeitures of neutrality and breaches of the warranty. We will consider these in their order; and first, of engaging in the privileged colonial or coasting trade of the enemy, in time of war.

By the law of nations, as understood and interpreted in this country, what has frequently been called the rule of 1756, is firmly established as a principle of our laws of war; viz., that if during war neutral property be engaged in any branch of the colonial or coasting trade of the enemy that is not open to foreigners in time of peace, such property loses its character of neutrality, and becomes liable to hostile capture.¹

Engaging in the privileged colonial trade of the enemy.

The rule stands on two grounds:—1, that the neutral, by thus acting, interposes to relieve the enemy from the condition to which the other belligerent had reduced him, and to that extent deprives the belligerent of the advantage he had gained:—and 2, that the neutral employed in a trade, reserved by the enemy to his own subjects, identifies himself with that enemy, and assumes his character;—in the words of Lord Mansfield, “if a neutral ship trades to a French colony with all the privileges of a French ship, and is thus adopted

v. Lewis, *ibid.* 404, 405; *Pollard v. Bell*, 8 T. R. 434; *Bird v. Appleton*, *ibid.* 562; *Price v. Bell*, 1 East, 663.

¹ The rule is firmly established; see *The Immanuel*, 2 O. Rob. Ad. R. 186;

and see especially 1 Kent's Com. 81-86, which contains an able exposition of the whole doctrine, together with a reference to the American authorities.

and naturalized, it must be looked on as a French ship, and is liable to be taken."¹

This rule was uniformly acted upon by Lord Stowell throughout the whole course of the great maritime wars of the French Revolution, from 1792 to 1815; and liability to its enforcement would no doubt imply a breach of the warranty of neutrality.²

The rule is restricted.

The rule is confined, however, to trade directly between the enemy's colony and the mother country; and is not applicable where the produce of a hostile colony is *bonâ fide* imported into a neutral country, and thence re-exported into the mother country.

A cargo of Spanish colonial produce was imported from the Havanah in an American ship into the United States, and after being landed and duties paid, was re-exported in the same ship into Spain; Lord Stowell held this to be a sufficient test of the *bona fides* of the transaction, and that the trade was legalized.³ But merely touching at the neutral port, and paying nominal duties there, was not enough.⁴

The question, in fact, in all cases, is one of intent. Did the *animus importandi* terminate at the immediate port, or look to an ulterior one? Was it, under the circumstances, a *bonâ fide* importation ending at the intermediate port, or a mere contrivance, to cover the original scheme of the voyage to an ulterior port? This is the true principle of the cases.⁵

This rule is not admitted by the United States.

This rule was uniformly repudiated by the United States throughout the whole of the war of 1812, but Chancellor Kent intimates the possibility, that if the United States were ever themselves to be engaged in a maritime war with an enemy, who threw the whole of his colonial or coasting trade into the hands of enterprising neutrals, they might be

¹ In *Berens v. Rucker*, 1 W. Bl. 314. France being then at war with this country, "French" in this paragraph is equivalent to belligerent.

² *Berens v. Rucker*, *qua supra*.

³ *The Polly*, 2 C. Rob. Ad. R. 361.

⁴ *The Essex*, 5 C. Rob. Ad. R. 369; *The Maria*, *ibid.* 365.

⁵ Per Sir Wm. Grant, in *The William*, 5 C. Rob. Ad. R. 385, 395.

induced to feel more sensibly than they had hitherto done, the weight of the arguments of foreign jurists in favour of the policy and equity of the rule.¹

Carrying simulated papers is a ground of capture and condemnation, and, if without leave expressly given in the policy, is a breach of the warranty of neutrality :² this is so, even though it be impossible without such papers to carry on the proposed trade.³

So, carrying suspicious papers has been held in the United States to be a breach of this warranty. Under a policy on goods "warranted American property," certain papers relating to a former shipment were concealed in a cask on board, and were referred to in a letter written in sympathetic ink, and they were such altogether as to throw a mystery over the shipment—this was held to amount to a breach of the warranty.⁴

Concealing papers material for the proof or preservation of neutral character, justifies a hostile detention, and carrying into port for adjudication; and on this ground it has been laid down in the United States by Marshall, C. J., "that the concealment of the ship's papers will generally amount to a breach of the warranty of neutrality."⁵

¹ 1 Kent, Com. 84, 85.

Mr. Phillips (no. 278), after stating that his countrymen had suffered much under this rule in the English Courts for having embarked in such trade during the French war of 1789, lays it down that such trade, opened to all neutral nations indiscriminately, ought not to be treated as contraband except after official notice. As regards *noties*, the rule had been recognised since 1766 at least. Besides, it is a fallacy to say the trade is *opened*. It continues to be a privileged trade, and the neutrals that embark in it become the privileged traders of the belligerent. Even if it were to be proclaimed a final abolition of the

privilege, this, being done under stress of war, and for belligerent purposes, may, according to a rule of the American Courts, be disregarded by the enemy. See *The Dos Hermanos*, 2 Wharton, 76; and ante p. 144.

² See *Horneyer v. Lushington*, 15 East, 47; *Oswell v. Vigne*, *ibid.* 70; *Bell v. Bromfield*, *ibid.* 364.

³ See the cases in East last cited, which answer the doubt raised on this point by Sir J. Mansfield, in *Steel v. Lacy*, 3 Taunt. 285, 292.

⁴ *Carrere v. Union Ins. Co.*, 3 Harris & Johnson, 324; 1 Phillips, Ins. no. 809.

⁵ *Livingston v. Maryland Ins. Co.*, Cranch, 536; 1 Phillips, Ins. no. 809.

Spoilation or destruction of papers.

The spoliation or destruction of papers is a still more aggravated circumstance of suspicion, and may justify an inference that the ship or goods are enemy's property without further proof. It does not, however, in this country create an absolute presumption *juris* and *de jure* to that effect.¹ And Lord Mansfield said, that though throwing papers overboard was considered a strong presumption of enemy's property, yet, in all his experience, he had never known a condemnation on that ground alone.²

So, attempting to disguise belligerent goods as neutral.

So it has been held in the United States, and apparently on sound principles, that an attempt to disguise belligerent goods as neutral, and carrying them as such, with the neutral part of the cargo, is a breach of the warranty of neutrality, and will avoid the policy as to the whole of the neutral cargo; although, if the same goods had been taken on board as enemy's goods, and so documented and represented, the only effect would have been to expose these to confiscation, without forfeiture of neutrality as to the rest.³

Enemy goods—neutral ships, *et vice versa*, no breach.

Previous to the treaty of Paris of 1856, it was an established rule of the law of nations, as acted upon in this country, that enemy's property carried on board neutral ships in time of war was liable to capture and confiscation. It was not, however, held to involve a forfeiture of neutrality, either of the ship in which it was carried, or of the cargo together with which it was loaded on board, if such cargo belonged to other owners and was covered by separate insurances.⁴

Neutral goods are not liable to seizure on board enemy's vessels; and this, on the same principle as regulates the case last considered, viz., that war gives a right to capture the

¹ The Hunter, 1 Dods. Ad. R. 480.

² Bernardi v. Motteux, 2 Dougl. 575, 581. The American rule is the same; The Pizzaro, 2 Wheaton, 227.

³ Phoenix Ins. Co. v. Pratt, 2 Binn. 308; Schultz v. Ins. Co. of North America, 3 Washington, C. C. R. 117.

⁴ See Barker v. Blakes, 9 East, 283.

goods of an enemy, but not of a friend. It would, therefore, be no ground for avoiding the policy, that goods "warranted neutral" had been put on board an enemy's vessel. This, however, must be understood as confined to the enemy's merchant vessels, for if placed on board an armed ship of the enemy, they are regarded as enemy's property; for this shows an intention to resist the right of search.¹

And the same consequence has been held to follow, for the same reason, if the ship on which they are loaded, though neutral, sails under convoy, or in company of an armed belligerent force, or under the licence of a hostile government.² The doing so would clearly amount to a breach of the warranty of neutrality.

It is an invariable principle of the law of nations, that if a neutral violates a blockade by carrying supplies to, or in any way trading with, a blockaded port, he is guilty of a high offence against the laws of war, and thereby subjects his ship and cargo to the penalty of confiscation;³ and this penalty may be enforced by seizure of ship and cargo at any time during the continuance of the ship's voyage out and home, though long subsequent to the act of violation.⁴ We shall have occasion in a subsequent chapter to enter at some length into the question of what constitutes a violation of blockade;⁵ it will be sufficient here to lay it down as an undoubted rule, that any act which can be so construed will entail a forfeiture of neutral privileges, and be a breach of the warranty of neutrality.

Violation of the laws of blockade.

Few modes of violating the rules of neutral conduct are

¹ *The Fanny*, 1 Dodson's Ad. R. 443. s. 117.

² *Ibid.* See also *The Maria*, 1 C. Rob. Ad. R. 340.

³ Bynkershoek, *Quæst. Juris Publici*, lib. i. c. 4, s. 11; Grotius de *Jure Belli ac Pacis*, lib. iii. c. 1, s. 5; Vattel, *Droit des Gens*, lib. iii. c. 7,

⁴ *The Welvaart van Pillaw*, 2 C. Rob. Ad. R. 128; *The Juffrow Maria Schroeder*, 3 C. Rob. Ad. R. 147.

⁵ See post, c. v. on the *Illegality of the Risks*.

Carrying
hostile
despatches.

of a more aggravated description than carrying hostile despatches, *i. e.*, communications made by the home government, or the spies of one of the belligerents, to its forces at the theatre of war, or *vice versa*. Such conduct in all cases exposes to confiscation the neutral ship so employed, and if there be any connection between the owner of the ship and cargo, then (but not, it seems, otherwise) the cargo also.¹ It is needless to add that it would amount to a breach of the warrant of neutrality.

Ambassadors'
despatches
not within
the rule.

But this rule does not extend to the case of a neutral ship carrying the despatches of the ambassadors of one of the belligerents from the neutral country to the sovereign of the belligerent state.²

Carrying
articles con-
traband of
war.

As we shall have to consider the whole subject of contraband of war in treating hereafter of the illegality of the risks, we will here only observe that, as carrying contraband articles entails the confiscation of all property on board the neutral ship belonging to the same owner, it would clearly amount to a breach of the warranty of neutrality as to such property. With regard to the ship, and such portion of the cargo as belongs to different owners, it will only produce such a result when the circumstances of criminality are such as involve both ship and cargo in one common penalty; as where they show that the shipowner and the other freighters were cognizant of, and concerned in, the contraband trading.

Of course, if there be an express warranty in a policy on goods against contraband of war, a breach of this warranty on the part of the assured, avoids the policy.³

Resisting
the right of
search.

In order to enforce the rights of belligerent nations against the various frauds and delinquencies of neutrals above detailed, and with a view to ascertain the real, as well as the

¹ The *Atalanta*, 6 C. Rob. Ad. R. 440.

³ *Seymour v. London and Provincial Mar. Ins. Co.*, 41 L. J. (C. P.) 193.

² The *Caroline*, 6 C. Rob. Ad. R. 461.

assumed, character of all vessels on the high seas, the law of nations arms the belligerents with the right of visitation and search.

If, upon making the search, the vessel be found employed in contraband trade, or (according to the rule acted upon in this country previous to the treaty of Paris of 1856) in carrying enemy's property, or in carrying hostile despatches, or troops, her case is at least ambiguous, and she is liable to be brought in for adjudication before a Court of Prize.

If either the ship herself, or the vessel under whose convoy she is sailing, resist this right of search when lawfully exercised, or attempt a rescue while being conducted into port for adjudication, such conduct amounts to a forfeiture of her neutrality, and exposes both ship and cargo without distinction to the penalties of confiscation.¹

Several attempts have been made in European history to put an end to the exercise of this right of search, as far as it relates to the carriage of enemy's goods on board neutral ships. The most memorable of these was the armed neutrality of 1780—a league formed by Russia, Sweden, Denmark, and other inferior states, under the auspices of the Empress Catherine,—in reality against England,—but professedly for the purpose of defending and propagating the principle “that free ships make free goods,” and that the neutral flag should be a substitute for all other proof of nationality and a protection for all goods carried under it, to the exclusion of the right of search.

England, considering this an attempt to introduce by force a new code of maritime law, which would go to extinguish altogether the right of maritime capture, perseveringly resisted it; and when, in the wars of the French Revolution, the armed neutrality reappeared under the title of the “Baltic

¹ See Vattel, lib. iii. c. 7, s. 114; the United States, *The Nerside*, 9; *The Maria*, 1 C. Rob. Ad. R. 340; Cranch, 427; *The Mariana Flora*, 11; the convention between Russia and Wheaton, 42. England, 17th of June, 1801. In

Confederacy," she so vigorously and promptly opposed its pretensions, that the attempt was speedily abandoned, and the right of belligerent search was admitted even by Russia to the very fullest extent.¹

Declaration
of Paris, 1856.

At the commencement in 1854, of the war with Russia, England consented to waive the assertion of certain principles of international law; and on the conclusion of hostilities, concurred with France, Austria, Russia, Prussia, Sardinia, and Turkey, in certain modifications of international law as theretofore maintained by Great Britain. The Declaration appended to the treaty of Paris of 1856 is this:—

1. Privateering is and remains abolished.
2. The neutral flag covers enemy's goods, with the exception of contraband of war.
3. Neutral goods, except contraband of war, are not liable to capture under enemy's flag.
4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coasts of the enemy.

With this declaration the United States declined to concur, except upon the further concession that enemy's goods on board enemy's merchant ships should be allowed the same exemption as on board neutrals.

At present, therefore, it appears that the right of search, abolished as far as relates to enemy's property on board neutral ships by the Declaration of Paris, subsists as to the other points in respect of which it was formerly exercised—viz., the carriage of troops—hostile despatches—contraband of war—and, of course, the national character of the ship herself.

The doctrine
expounded.

From the ablest and most eloquent exposition anywhere to be met with of the whole doctrine of the right of search, the celebrated judgment of Lord Stowell, in the case of *The Maria*,² we cite the points established in it as they are

¹ In the convention between England and Russia, 17th June, 1801, the latter admitted the right of search,

even of merchant ships under convoy of a ship of war.

² 1 C. Rob. Ad. B. 340.

expressed by that great master of law and language: they are as follows:

1. The right of visiting and searching merchant ships on the high seas, whatever be the ships, whatever be the cargoes, whatever be the destination, is an incontrovertible right of the lawfully commissioned cruisers of the belligerent nation. 2. The authority of the sovereign of the neutral country being interposed in any manner of mere force, cannot legally vary the rights of a lawfully commissioned belligerent cruiser. 3. The penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search.

In accordance with these principles, Lord Stowell, in that case, pronounced sentence of condemnation on a whole fleet of Swedish ships, sailing under convoy of a Swedish man-of-war that had instructions on board to resist by force the right of search claimed by lawfully commissioned British cruisers. This was deemed in law to be resistance on the part of the whole convoy, subjecting all to confiscation.¹ The very act of sailing under protection of a belligerent or neutral convoy, for the purpose of resisting search, is a violation of neutrality.²

Consequences
of resistance
or of prepara-
tion to resist.

The right of search involves also the right of carrying the vessel into port for the more satisfactory examination of the national character of the property, in cases where there is a reasonable ground of doubt.³ It is therefore a breach of the warranty if the captain and crew of the neutral, thus carried in, attempt to rescue the vessel.⁴

With regard to the limitations upon the exercise of the right of search, it must be observed that it can only be exercised—1. By ships of war or lawfully commissioned cruisers

¹ *The Maria*, 1 C. Rob. Ad. R. 340.

² *Ibid.* 375. See the authorities collected as to this point, 1 Kent, Com. 156, and notes; and 1 Phillips, Ins. no. 818.

³ *The Maria*, *qua supra*.

⁴ *Garrels v. Kensington*, 8 T. R. 230; *S. P.* decided in the United States, *Wilcocks v. Union Ins. Co.*, 2 Binn. 574, cited 1 Phillips, Ins. no. 822. See also *The Dispatch*, 3 C. Rob. Ad. R. 278.

of the belligerents; 2. Upon private merchant ships of the neutrals, and not in any case upon public ships of war; 3. During the existence of war; 4. In accordance with the spirit and sanction of the law of nations.¹

With regard to the mode of its exercise, it may be laid down generally that it must be conducted with due care and regard to the rights and safety of the vessel.²

Foreign sentences as evidence of breach of warranty.

One of the means of evidence most frequently used for proving that the ship or goods warranted neutral had forfeited their neutrality, is the judgment or sentence of a competent Prize Court pronouncing their condemnation. We will consider, 1st, what is to be deemed a Court of competent jurisdiction in questions of prize; and, 2ndly, when the sentence of such Court is to be received as conclusive evidence of the breach of warranty.

Court of Prize.

Whether a Court acting as a Court of Prize has competent jurisdiction depends mainly upon these points—1, by whom it was held; 2, in whose dominions it was held; and, 3, where the prize itself lay.

1. A Prize Court of the government of the captor.

1. The condemnation must be pronounced by a Prize Court of the government of the captor; such a Court even of a co-belligerent having no jurisdiction.

2. Sitting in the territory either of the captor or of an ally, but not of a neutral.

2. As to place, it is established, that although the Prize Court of the captor may sit in the territory of a belligerent ally, yet it is not lawful for such a Court to act in the territory of a neutral,³ notwithstanding such territory is in military possession of a belligerent, if the neutral government be still *de facto* existing.⁴

¹ See *The Maria*, *qua supra*; *Le Louis*, 2 Dods. Ad. R. 210.

² *Thurloe's State Papers*, vol. ii. p. 503. Mr. Canning's letter to Mr. Monroe, August 3, 1807, cited 1 Kent, Com. 156, note *a*.

³ *The Flad Oyen*, 1 C. Rob. Ad. R.

185; *Havelock v. Rockwood*, 8 T. R. 268. The *S. P.* held in the United States, *L'Invincible*, 1 Wheaton, 238; *The Estrella*, 4 Wheaton, 298.

⁴ *Donaldson v. Thompson*, 1 Camp. 429; *Hagedorn v. Bell*, 1 M. & Sel. 450.

Co-belligerents are, however, so far identified, that a Prize Court of one of them sitting in its own territories,¹ or in the territories of the other,² is of competent jurisdiction to condemn a captured ship lying at the time in one of the ports of such other co-belligerent.

3. But it is of the very nature of the proceeding *in rem*, and an essential principle of the law of nations, that a Court of Prize sitting in the territory of the captors—in the position, therefore, proper to the most plenary exercise of its extremist jurisdiction—has no jurisdiction over a prize lying at the time in a neutral port, notwithstanding that such prize continues in possession of the captors.³ This is the ancient and established rule of the English Prize Court.⁴ But because some of his predecessors had not observed the rule with invariable strictness, and the enemy had proceeded against a British ship on the bad authority of these exceptions, Lord Stowell affirmed the sentence of the enemy, although founded on such exceptionable decisions, doing it as an act of expedient equity of an exceptional nature, but at the same time protesting while he did so, that he did it to win back the practice to the purity of the principle.⁵ Since this noble and magnanimous vindication of English prize law, it is surprising to find it still laid down in English and American treatises that that great Judge surrendered the true principle to the force of some occasional instances of unsound practice.⁶

3. The prize must not be in a neutral port.

¹ *The Christopher*, 2 C. Rob. Ad. 209.

² *Oddy v. Bovill*, 2 East, 473.

³ *The Herstelder*, 1 C. Rob. Ad. R. 114, 119; *MacLachlan, Shipping*, 21, 22, and cases there cited.

⁴ *Ibid.*; *The Henric and Maria*, 4 C. Rob. Ad. 43; *S. C.* 6 id. 139; *The Polka*, *Spink's Prize Court R.* 57.

⁵ *The Henric and Maria*, 4 C. Rob. Ad. R. 43; and the judgment of the Court of Appeal in that case by Sir

W. Grant, 6 C. Rob. Ad. R. 139, note; *The Purissima Concepcion*, 6 id. 45, 47.

⁶ Mr. Arnould, even in the second edition of this work, erred in this way; and so did Mr. Serjeant Shee, the late editor of *Abbott on Shipping*. See the true principle of Lord Stowell's decision in *The Henric and Maria* for the first time truly set down in *MacLachlan, Shipping*, 22, note.

Foreign
sentence
evidence.

How far the sentences of foreign Courts of Prize shall be deemed to be conclusive evidence of a breach of the warranty of neutrality in an English Court of justice, was a question on which considerable difference of opinion among the Judges at one time existed.

"Since the judgment of the House of Lords in *Lothian v. Henderson* (1803) it may now be assumed," says Lord Ellenborough,¹ "as the settled doctrine of a Court of English law, that all sentences of foreign Courts of competent jurisdiction to decide questions of prize, are to be received here as conclusive evidence in actions on policies of insurance upon every subject immediately and properly within the jurisdiction of such foreign Courts, and upon which they have professed to decide judicially."

Same rule in
the United
States.

This rule of the English law has been adopted in the Federal Courts of the United States,² where, notwithstanding some difference of opinion in the State Courts on the point, the weight of judicial authority seems clearly to be in favour of the binding force, and universal application of this doctrine of English law.³

But not in
France.

The law in France is different, and the French Courts, though they will enforce a foreign judgment in France, after subjecting to examination the grounds on which it proceeds, will not permit a foreign judgment, though pronounced by a competent Court, to be conclusive evidence in the French Courts of the facts as to which it decides.⁴

In England.

The first English case in which this rule of international

¹ Per Lord Ellenborough, C. J., *Bolton v. Gladstone*, 5 East, 155, 160. See the learned opinions delivered by Blackburn, J., in the cases of *Castrique v. Imrie*, L. R., 4 H. of Lds. 414; *Goddard v. Gray*, L. R., 6 Q. B. 139; *Schibsy v. Westenholz*, *ibid.* 155.

² *Croudson v. Leonard*, 4 Cranch,

435; *Bradstreet v. The Neptune Ins. Co.*, 3 Sumner's Rep. 600.

³ Kent, Com. 121, and notes.

⁴ Such seems to be the result of the modern French authorities, which, however, are very conflicting. See the very elaborate and learned note of Chancellor Kent, Com. vol. ii. p. 121, note.

comity was established in favour of judgments of a friendly power, was that of *Hughes v. Cornelius*, in the year A.D. 1682.¹ The rule was afterwards extended to the case of hostile tribunals, many of the English Judges expressing their regret at this establishment and extension of the rule, Lord Ellenborough in particular.² But the doctrine stands on too firm ground to be shaken, and it only remains to notice the somewhat perplexed decisions by which, under varying circumstances, the English Courts have sought to modify and apply it.

The proposition itself is: that the sentence of a foreign Court of Prize is conclusive evidence in our Courts upon all points within its jurisdiction, and, upon which the sentence, on the face of it, professes to decide, but upon none other.

Limitations
of the doc-
trine.

Of this, the chief point is, that these judgments are only conclusive as to the points upon which they profess to decide. It follows that, unless the sentence professes to be grounded on some fact or state of facts, which, by the law of nations, amounts to a forfeiture of neutrality,—*e. g.*, that the ship was “enemy’s property,” or “was not properly documented according to treaties,” the sentence is not conclusive evidence of a breach of the warranty of neutrality.

Formerly, indeed, our Courts declined giving conclusive effect to facts recited in the preamble of these sentences as motives of the condemnation, but not expressly stated in the adjudicative clause as the ground of the sentence.³ Subsequently a more liberal rule of interpretation prevailed, according to which, if it clearly appear, by necessary inference from the whole of the sentence taken together, what ground it proceeds upon, and that this ground is incompatible with

¹ Carth. 32; T. Raym. 473; Shower, 143.

² *Donaldson v. Thompson*, 1 Camp. 429. See also his remarks in *Fisher v. Ogle*, *ibid.* 418. The learned judge had more than a suspicion of the unprincipled (he called them “piratical”) proceedings of even the

highest of the French tribunals of prize during the wars in the beginning of the 19th century. See these suspicions amply justified in the *Souvenirs de M. Berryer*, vol. ii. c. 3, Paris, 1839, cited in *Senior’s Biog. Sketches*, 1863, pp. 55–58.

³ *Christie v. Secretan*, 8 T. R. 192.

the neutrality of the condemned property, such a sentence will be conclusive as to the breach of the warranty.¹

But then, in order to have this effect, the real ground upon which the sentence proceeded must be clearly deducible by plain inference from the whole taken together. If there be so much ambiguity as to make it impossible to ascertain the real ground on which it proceeded, the sentence is not conclusive. Moreover, our Courts must always be satisfied of the actual ground of condemnation abroad, that it is such as, by the law of nations, works a forfeiture of neutrality, before it is allowed to have that effect.²

The rule is thus laid down by Chief Justice Tindal:—
“In order to conclude the parties from contesting the ground of condemnation in an English Court of law, such ground must appear clearly on the face of the sentence; it must not be collected by inference only or left in uncertainty, whether the ship was condemned on one ground, which would not be a just ground of condemnation by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country.”³

*Bernardi v.
Motteux.*

In an early case before Lord Mansfield, where a sentence of ambiguous construction stated on the face of it two facts as the basis of adjudication, one of them raising the inference that the condemnation did not proceed on the ground of enemy's property, but on the ground of a non-compliance with the private ordinances of the condemning state, his Lordship permitted the plaintiff to show by collateral evidence, that the latter ground was that on which the foreign

¹ See *Kindersley v. Chase*, 1 Marshall, Ins. 425; *Bell v. Carstairs*, 14 East, 374, 392; *Bolton v. Gladstone*, 5 East, 155; *S. C.* 2 Taunt. 85; *Baring v. Royal Exch. Ass. Co.*, 5 East, 99, overruling as to this point the N. P. decision of Lord Ellenborough in *Fisher v. Ogle*, 1 Camp. 418, in which his Lordship decided that the sentence is evidence only of what it positively and specifically

affirms in the adjudicative part of it, not of what may be gathered from it by way of inference.

² *Bernardi v. Motteux*, 2 Dougl. 575; *Calvert v. Bovill*, 7 T. R. 523; *Fisher v. Ogle*, 1 Camp. 418; *Dalgleish v. Hodgson*, 7 Bing. 495.

³ *Dalgleish v. Hodgson*, 7 Bing. 504; *Accord. Hobbs v. Henning*, 34 L. J. (C. P.) 117; 17 C. B., N. S. 791.

Court really proceeded.¹ So, in a case before Lord Kenyon *Calvert v. Bovill.* and the Court of King's Bench, the sentence condemned property, "warranted American," on three grounds, none of which was a just ground of condemnation by the law of nations; the Court held the sentence not conclusive to prove a forfeiture of neutrality.²

Where the sentence merely condemned the ship as prize, without stating on the face of it any grounds of condemnation, Lord Mansfield in one case permitted the defendant to show, by collateral evidence, that it really proceeded on the ground of a violation of neutrality.³ In another case of the same kind, his Lordship held that the mere fact of condemnation by a competent Court, "as good and lawful prize," where no grounds were stated, was conclusive evidence as to the breach of neutrality.⁴ But the authority of this case has long been doubted,⁵ if indeed it be not irreconcilable with the rule in *Dalgleish v. Hodgson*, laid down, as above, by Tindal, C. J., and thereby in effect overruled.

There is much more reason for holding a sentence conclusive if it expressly condemns ship or goods on the ground of their being enemy's property, though manifestly unjust, for, provided it be not impeached on the ground of fraud or such mal-praxis as amounts to a denial of justice, the remedy is by appeal in the country of the sentence.⁶

In case of a policy on freight of a ship "warranted American property," the ship had been captured by a French privateer, and was condemned by the sentence of a French Prize Court, which, after reciting the fact that she had not a list of her crew on board conformably to the model annexed to the treaty of 1778 between France and the United States,

Geyer v. Aguilar.

¹ *Bernardi v. Motteux*, 2 Dougl. 575.

² *Calvert v. Bovill*, 7 T. Rep. 523; *S. P. Dalgleish v. Hodgson*, 7 Bing. 495.

³ *Fernandez v. Da Costa*, 1 Marshall, Ins. 398.

⁴ *Saloucci v. Woodmass*, 1 Mar-

shall, Ins. 405.

⁵ See 2 Smith's L. C. 827, 828.

⁶ *Castrique v. Behrens*, 30 L. J. (Q. B.) 163; *Castrique v. Imrie* (in error), 8 C. B., N. S. 405; 30 L. J. (C. P.) 177; *S. C.*, L. R., 4 H. of Lds. 414.

proceeded as follows:—"The tribunal, therefore, adjudges the validity of the capture and confiscation of the ship and cargo, the whole being, for want of the captain's having the papers in due form, decreed to belong to the enemies of the Republic." The Court of King's Bench held this sentence to be conclusive evidence of a breach of the warranty,¹ Lord Kenyon saying, "the ground on which the French Court proceeded in this case was, that this was a capture of enemy's property. Whether or not those Courts arrived at that conclusion by proper means, I am not at liberty to inquire. Here the question is, whether they have not stated, as the foundation of the condemnation, a ground which will bear them out supposing it to be true; and I am clearly satisfied that they have."

It is enough, although this do not appear in the adjudicative part of the sentence, if it can be clearly collected from the whole of the sentence taken together, that they must have proceeded on the ground that it was enemy's property.

Kindersley v.
Chase.

Goods "warranted Swedish property" were, with the ship, seized and condemned by the Prize Court of the Isle of France, who by their sentence, after stating the principal question to be "whether the ship and cargo were enemy's property or Swedish property," proceeded to set forth several insufficient grounds of condemnation, and then, in the adjudicative clause of the sentence, referring to all that had preceded, used these words, "Whereupon the Court declared the ship and cargo to be lawful prize." Sir William Grant, on appeal, giving judgment at the Cockpit, held, that, as the French tribunal had considered the question whether the property was enemy's or neutral, and had then adjudged it to be lawful prize, this was sufficient evidence of a breach of the warranty, as they must be supposed to have proceeded on the ground that it was enemy's property. "The result of all the cases," said this very learned judge, "is, that a sentence

¹ Geyer v. Aguilar, 7 T. Rep. 681; per Curiam, *Castrique v. Imrie* (in error), 30 L. J. (C. P.) 177, 184, 188. 32; 7 Raym. 473; 1 Shower, 143;

of a Court of Admiralty is conclusive as to all that it professes to decide. Now, is it possible to say that this Court did not profess to decide whether this was, or was not, enemy's property? It was the only question the Court *did* profess to decide."¹

Sir William Grant, in the same case, intimated that there is a general presumption that such a sentence proceeds on legitimate grounds, which throws on the party impeaching them the duty of showing that it has proceeded on some other grounds.²

The presumption of lawful grounds.

¹ *Kindersley v. Chase*, at the Cockpit, 22nd July, 1801, 1 Marshall, Ins. 425, 426, 427. See also *Bolton v. Gladstone*, 5 East, 155; (in error) 2 Taunt. 85, which proceeded on the same principle. And see the various cases illustrative of breach of warranty of neutrality, already cited.

² See the effect of judgments, and of judgments *in rem*, considered, 2

Smith's L. C. 827, 828. See the learned opinion of Blackburn, J., delivered in the House of Lords in *Castrique v. Imrie*, L. R., 4 H. of Lds. 414; and as to foreign judgments generally, the judgments delivered by the same learned Judge in *Goddard v. Gray*, L. R., 6 Q. B. 139; and in *Schibsby v. Westenholz*, *ibid.* 155.

CHAPTER IV.

IMPLIED WARRANTIES.

<p>Seaworthiness - - - 648</p> <p> in what policies- - - 649</p> <p> on what subjects - - - 650</p> <p> what satisfies - - - 652</p> <p> in respect of voyage - 664</p> <p> relative significance of</p> <p> term - - - - 669</p> <p> in respect of hull - - 670</p> <p> of master and crew 674</p> <p> of pilot - - - 677</p>	<p> proof of - - - - 678</p> <p>Documentary evidence on board</p> <p> of national character - 680</p> <p> consequences of breach - 681</p> <p> proof of breach - - - 681</p> <p> simulated papers - - - 685</p> <p> without leave - - - 685</p> <p> with leave - - - 686</p> <p>Legality - - - - - 686</p>
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AFTER what is laid down in a preceding chapter of warranties, as distinguished from representations,—that the former must always appear on the face of the policy,—the superscription to the present chapter follows with a semblance of inconsistency and contradiction. It is in appearance only, however; for, in reality, there is none. The warranties to be considered are almost never expressed, on the face of the policy, but being implied in it by the law of the land, they are of the same obligatory force and high evidence as the law itself, impaired in neither by being omitted from the instrument, and gaining nothing in either by being expressed in the policy.¹

Seaworthiness Of these warranties, by far the most important is that of seaworthiness. In every voyage policy there is an implied warranty that the ship is seaworthy when the risk attaches; by which is meant that she shall be in a fit state as to repairs, equipments, crew, and all other respects, to encounter

¹ See ante, p. 516, 541.

the ordinary perils of the risk insured at the time of its commencing.¹

Seaworthiness is a word the import of which varies with the place, the voyage, class of the ship, or even the nature of the cargo.² The ship may be fit for port or river risks, and that suffices while there;³ or seaworthy for one voyage, and not for another, or for one class of cargo and not for another;⁴ or as fit for the voyage contemplated as such a vessel is capable of being made.⁵ She must not be overloaded, and her cargo must not be badly stowed.⁶ "The term seaworthy," said Erle, J., in the House of Lords, "when used in reference to marine insurance, expresses a relation between the state of the ship and the perils it has to meet in the situation it is in."⁷

The term varies in meaning.

There is nothing in the law of marine insurance more important to commerce and the preservation of human life, than this warranty.⁸ It is not implied, however, in time policies.⁹ In voyage policies, on the contrary, it is an implied condition precedent to the underwriter's liability for any loss whatever incurred during the continuance of the risk,¹⁰

Implied in Voyage policies and in these only.

¹ Per Parke, B., *Dixon v. Sadler*, 5 M. & W. 414; per Brett, L. J., "The contract of sea insurance is against extraordinary perils, therefore the implied warranty is that the vessel shall be fit to encounter ordinary perils," in *Turnbull v. Janson*, on appeal, 1 May, 1877, MS.

² Per Erle, C. J., *Foley v. Tabor*, 2 F. & F. 662.

³ *Annen v. Woodman*, 3 Taunt. 299; *Bouillon v. Lupton*, 33 L. J. (C. P.) 37; per Parke, B., 5 M. & W. 414; per Alderson, B., 4 H. of Lds. C. 393.

⁴ *Biccard v. Shepherd*, 14 Moo. P. C. 471.

⁵ *Knill v. Hooper*, 26 L. J. (Ex.) 377; 2 H. & N. 277; *Burges v. Wickham*, 3 B. & S. 669; 33 L. J.

(Q. B.) 17; *Clapham v. Langton*, 34 L. J. (Q. B.) 46. *Secus*, *Turnbull v. Janson*, 36 L. T., N. S. 635 (C. A.), where the vessel was not as fit as she could be made by reasonable, available means.

⁶ *Foley v. Tabor*, 2 F. & F. 662; *Biccard v. Shepherd*, *quâ supra*; *Daniels v. Harris*, L. R., 10 C. P. 1.

⁷ 4 H. L. Cas. 384.

⁸ See the observations of Lord Eldon in *Douglas v. Scougall*, 4 Dow, 276, and of Lord Redesdale, in *Wilkie v. Geddes*, 3 Dow, 60.

⁹ *Dudgeon v. Pembroke*, 2 App. Cas. 284; *Gibson v. Small*, 4 H. of Lds. C. 353.

¹⁰ Per Lawrence, J., *Christie v. Secretan*, 8 T. R. 192, 198; per Lord Ellenborough, *Wedderburn v. Bell*, 1 Camp. 1, 2.

and is so proper to such a contract as only to be excluded from it by terms in writing in the policy very express and definite to that end. Therefore a voyage policy that excepted losses from rottenness, inherent defects, and other unseaworthiness, was held not to have excluded thereby seaworthiness as an implied condition precedent to the policy attaching; consequently the boiler in that case being defective at starting, the plaintiff did not recover, although the defect had been made good before the loss.¹

As seaworthiness is a condition of the contract of insurance, breach of the condition avoids the contract and deprives the assured of any recourse against the insurers, whether his loss can be traced to such breach or not.²

This is a condition of the contract.

It therefore matters not whether the assured know it or not; if the ship was not, in fact, seaworthy at the outset of the adventure, either in the degree commensurate with her then risk, or for the contemplated voyage, as the case may be, that state of things never existed which was the ground of the underwriter's promise, and he consequently can never be bound thereby. Hence, as Lord Eldon says, "It is not necessary to inquire whether the owners acted honestly and fairly in the transaction."³

Thus, notwithstanding the owner had his ship surveyed and fully repaired, as the shipbuilder thought, before sailing, but she proved to be unseaworthy from a latent defect (the unsoundness of some timbers near her keel) not discovered during the survey or repair, Lord Mansfield held the underwriter discharged from his liability by the mere fact of unseaworthiness.⁴

In a policy on goods.

This same rule holds good in respect of every voyage policy, whatever may be the subject of insurance. Not that there is any such implied warranty in respect of the cargo,⁵

¹ *Quebec Marine Ins. Co. v. Commercial Bank of Canada*, L. R., 3 P. C. 234.

² *Forshaw v. Chabert*, 3 B. & B. 158; *Quebec Marine Ins. Co. v. Commercial Bank of Canada*, L. R., 3 P.

C. 234.

³ Per Lord Eldon, in *Douglas v. Scougall*, 4 Dow, 276.

⁴ *Lee v. Beach*, 1 Park, Ins. 468.

⁵ *Kœbel v. Saunders*, 17 C. B., N. S. 71; 33 L. J. (C. P.) 310.

but in respect of the conveying ship under a policy on goods there is; so that the policy on goods is equally conditional as if it were a policy on the ship herself. Thus, in an action brought by an innocent shipper of goods (who had no interest whatever in the ship), on proof being given that the ship was unseaworthy when she sailed, Lord Mansfield nonsuited the plaintiff, saying, that the implied warranty could not be dispensed with in any case;¹ and this is now well understood to be the law of England on the subject.²

Of course it is quite in the power of the insurers, after condition broken, by memorandum indorsed on the policy, to make themselves liable on the risk.

Under an insurance "on ship and outfit," for a voyage "at and from London to Bahia," the ship sailed from London, and in the Channel encountered bad weather, and made so much water, that it became evident she was overloaded, and could not continue her voyage with safety unless she were lightened. The master, with the consent of the underwriters, expressed by a memorandum on the policy,³ unshipped part of the iron in Ramsgate harbour, and proceeded on his voyage, in the course of which a loss occurred wholly unconnected with the original state of unseaworthiness of the ship when she first sailed from London; the jury found that the ship was seaworthy for her voyage when she sailed from Ramsgate, and the Court upon this and the other facts of the case, held that the underwriters were liable for the loss.⁴

Weir v. Aberdeen.

¹ *Oliver v. Cowley*, 1 Park, Ins. 470.

² The law is the same in the United States: see 1 Phillips, Ins. no. 695.

³ In these terms, "It is agreed that the ship may load, unload, and reload goods, and discharge part of her cargo at Ramsgate."

⁴ *Weir v. Aberdeen*, 2 B. & Ald. 320.

The following is the language attributed to Lord Tenterden in the report:—"It is said that this memorandum expressing the consent of the underwriters is void, and that in order to bind the underwriters a new contract was necessary, inasmuch as the vessel having once sailed with a cargo greater than was proper for that voyage, and therefore in an unseaworthy state, wholly put an

Lord Penzance, delivering the judgment of the Privy Council in a recent case, says, "the case of *Weir v. Aberdein* did not proceed upon the language that is attributed to Lord Tenterden—whether he was fully and rightly reported or not—but the judgment proceeded, as it appears to their Lordships, distinctly upon the principle that the underwriters had been aware of the unseaworthiness, and had assented to the vessel putting back to the port, to cure herself of the defect, and therefore they were held responsible. They had assented in writing on the policy to maintain their liability notwithstanding the violation of the warranty."¹

What satisfies
this war-
ranty.

It is enough to satisfy this warranty if the ship be originally seaworthy for the voyage insured when she sails on it. There is no implied warranty that the ship shall continue seaworthy in the course of it. "Every ship," says Lord Mansfield, "must be seaworthy when she first sails on the voyage insured, but she need not continue so throughout the voyage."²

As to hull.

On this ground it has been frequently held that under a policy on a voyage out and home, the risk being entire and indivisible, it is sufficient if the ship be seaworthy for the entire voyage when she first sails from the home port of

end to their liability on the policy. That proposition would go the length of establishing that if a vessel at the outset of her voyage be, by mistake or accident, unseaworthy, owing to some defect which is immediately discovered and remedied before any loss happens in consequence of it, still that the policy would be void, and the underwriters not liable. I confess that I was a little surprised at that proposition, because if true in point of law, I fear we should find many cases indeed, where it would turn out that the assured could have no claim upon the underwriters because something was

wanting or something excessive, at the instant of the ship's departure, although the want had been supplied or the excess removed before the loss happened," p. 323. Mr. Phillips has cited the words and formulated them into a principle: no. 726.

¹ Lord Penzance in *Quebec Marine Ins. Co. v. Commercial Bank of Canada*, L. R., 3 P. C. 234, 244.

² Per Lord Mansfield, *Bermon v. Woodbridge*, 2 Dougl. 781, 788; per Id., *Eden v. Parkinson*, *ibid.* 732, 735; so per Lord Eldon, *Watson v. Clark*, 1 Dow, P. C. 344; so per Parke, B., *Dixon v. Sadler*, 5 M. & W. 414, 415.

loading; and there is no breach if she be not in a seaworthy condition on sailing from the out-port on her homeward passage, or from any intermediate port out or home.

Thus, in case of a voyage "at and from Honfleur to the coast of Angola, during her stay and trade there, at and from thence to her port or ports of discharge in St. Domingo, and at and from St. Domingo back to Honfleur," Lord Mansfield said, that if this was one entire risk (which, as the premium was entire, he held it to be), the underwriters were liable if the ship was seaworthy when she left Honfleur, though not so at Angola, or any of the subsequent stages of the voyage.¹

Bermon v. Woodbridge.

So, in case of another voyage "at and from Belfast to her port or ports of loading in British America, during her stay there, and back to a port of discharge in the United Kingdom," &c., and the evidence showed that the ship was seaworthy at Belfast and when she sailed from that port, but unseaworthy when she left St. Andrew's on the homeward passage, the counsel for the defendants admitted that, being seaworthy at the commencement of the risk, the implied warranty was satisfied.²

Holdsworth v. Wise.

Assuming that these are cases as to the sound state of the hull, &c., of the ship as such, it is to be added that the same principle holds good as to the master and crew, for whose continued good conduct in the course of the voyage there is no implied warranty binding on the assured. If the vessel, crew, and equipment be originally sufficient, and the master a person of competent skill, the assured has done all he contracted to do; and although such master and crew should by their acts or omissions bring the ship in the course of the voyage, and at the time of loss, into an unseaworthy (*i. e.* uninsurable) state, yet the underwriter is liable for all loss, which, though remotely occasioned by such superinduced

Crew and equipment.

¹ *Bermon v. Woodbridge*, 2 Dougl. 788.

794. See also *S. P., Redman v. Wilson*, 14 M. & W. 476.

² *Holdsworth v. Wise*, 7 B. & Cr.

state of unseaworthiness, is yet proximately caused by the perils insured against.¹

Bayley, J.

"It is the duty of the owner," says Bayley, J., "to have the ship properly equipped, and, for that purpose, it is necessary that he should provide a competent master and crew in the first instance; but having done this he has discharged his duty."²

Parke, B.

"He makes no warranty," says Parke, B., "that the vessel shall continue seaworthy, or that the master and crew shall do their duty during the voyage; and their negligence and misconduct is no defence to an action on the policy, where the loss has been immediately occasioned by the perils insured against. Nor can any distinction be made in this respect between the omission by the master and crew to do an act which ought to be done, or the doing an act which ought not, in the course of the navigation. It matters not whether a fire, which causes a loss, be lighted improperly, or, after being properly lighted, be negligently attended: whether the loss of an anchor, which makes a vessel unseaworthy, be attributable to the omission to take proper care of it, or to the improper act of slipping it or cutting it away; nor could it make any difference, whether any other part of the equipment were lost by mere neglect, or thrown away and destroyed in the exercise of an improper discretion by those on board."³

The numerous decisions illustrative of these positions will be considered more at large when we treat of the losses covered by the policy;⁴ we will here merely cite one or two of those which bear more particularly on the subject of unseaworthiness.

¹ *Busk v. Royal Exch. Ass. Co.*, 2 B. & Ald. 73; *Walker v. Maitland*, 5 B. & Ald. 171; *Bishop v. Pentland*, 7 B. & Cr. 219; *Holdsworth v. Wise*, 7 B. & Cr. 794; and see especially *Phillips v. Headlam*, 2 B. & Ad. 380; *Dixon v. Sadler*, 5 M. & W. 405; *S. C.*, (in error), 8 M. & W. 895; *Redman v. Wilson*, 14 M. & W. 476; *Phillips*

v. Nairne, 4 C. B. 343; 16 L. J. (C. P.) 194; *Biccard v. Shepherd*, 14 Moo. P. C. 471; *Dudgeon v. Pembroke*, 2 Appeal C. 284.

² Per Bayley, J., in *Walker v. Maitland*, 5 B. & Ald. 171, 175.

³ Per Parke, B., in *Dixon v. Sadler*, 5 M. & W. 414, 415.

⁴ Post, Part III. Chap. II.

It makes no difference whether the state of unseaworthiness be occasioned by the negligence of the master and crew or of other parties employed by the assured upon the business of the ship in the usual course of trade.

Unseaworthiness through negligence.

A ship insured "from London to Sierra Leone, while there, and back to her port of discharge in the United Kingdom," was loaded with teak at an island in the Sierra Leone river by the African natives (who are generally employed in that trade for the purpose), and then began dropping down the river on her passage home; it was soon found, however, that, owing in all probability to unskilful stowage by the natives, she had become so leaky as to be unfit to put to sea, and having, on examination, been pronounced unseaworthy, she was voluntarily run on shore to prevent her sinking in the river, and ultimately sold where she lay, as not being fit to repair. The plaintiff claimed a total loss by the perils of the sea; and the ship being seaworthy when she sailed from London, the court held the underwriters liable, as the loss, though remotely arising from the negligence of the natives, was proximately caused by a peril of the sea.¹

Redman v. Wilson.

A ship insured "from Bristol to Sierra Leone, and back," had encountered in the course of the voyage severe storms, and become so damaged and leaky that she was obliged to run for Gambia, where she was found to be unseaworthy, and not within reach of the repairs that had become indispensable; in consequence of which she was necessarily sold as she lay. The defendants proposed to show that the loss had arisen solely from the decayed and unseaworthy state of the ship; but this they were precluded from doing by an admission on the face of the policy that the ship was seaworthy for the voyage. And the Court held, on motion in arrest of judgment, that the declaration sufficiently showed the

Parfitt v. Thompson.

¹ Redman v. Wilson, 14 M. & W. 476. See also Dixon v. Sadler, 5 M. & W. 405 (in error); 8 M. & W. 895; and Dudgeon v. Pembroke, 2 Appeal C. 284, in both of which cases

this question, apart from that of seaworthiness, was distinctly raised and discussed, and decided in accordance with the cases mentioned in the text.

loss to be by perils of the sea so as to make the underwriters liable.¹

Phillips v.
Nairne.

A ship by a clause in the policy "allowed to be seaworthy for the voyage," met in the course of it with a violent hurricane, by which she was so damaged as to be obliged to run for the Mauritius, where it was found that, from this damage and from the age and decayed state of the ship, she was not worth repairing, and was accordingly sold. It appeared, however, upon the whole evidence, that, but for the storm, the decayed parts of the ship would have been strong enough to enable her to perform her voyage with safety. There was a verdict for the plaintiff, and the Court refused to grant a new trial.²

Taking pilot
at particular
stages of the
voyage.

In the case of *Hollingworth v. Brodrick*, Patteson, J., while expressing his adherence to the general rule, said that "unseaworthiness for want of a particular description of crew is an exception to the rule, because one crew may be necessary in one part of the voyage, and another in another."³ We have already adverted to the general doctrine that might be inferred from this language, and shall have occasion hereafter to discuss it at length. These words are here cited as an introduction to a very nice question respecting the employment of a pilot in the course of the voyage, and how far that question bears upon the general rule under discussion.

Thus, for instance, if usage requires that at a particular stage of the voyage the ship should take a pilot on board before entering an intermediate port, or her port of destination, it has been inferred that her failure to do so, in consequence of which a loss accrues, will discharge the underwriters from their liability, although the loss may be proximately caused by the perils insured against, and the ship have been in all respects seaworthy at the commencement of the voyage.

The course, however, of the more recent English decisions

¹ *Parfitt v. Thompson*, 13 M. & W. 392.

² *Phillips v. Nairne*, 4 C. B. 343; 16 L. J. (C. P.) 194.

³ See the remarks of Patteson, J., in *Hollingworth v. Brodrick*, 7 A. & E. 48.

in connection with this subject will not warrant us in stating the rule thus broadly.

On the contrary, the true position seems to be, that except Rule. where positively required by the provisions of an Act of Parliament (in case such provisions, to put it in the manner of Patteson, J., have the effect of creating an intermediate voyage, on which the ship is not seaworthy without a pilot),¹ the negligence of the master in not taking a pilot on board in entering a port at any intermediate stage of the voyage, where usage requires him to do so, will not discharge the underwriters from their liability, provided the ship were seaworthy when she sailed, the master and crew originally competent, and the loss, though remotely occasioned by the want of a pilot, be proximately caused by the perils insured against.

Thus, the captain of a ship insured "from Liverpool to Sierra Leone, and back to her ports of discharge in the United Kingdom," on arriving off Sierra Leone (where there is an establishment of pilots, and where it is usual for all ships going in or out of the river to take one), made signals for a pilot to come off; but as none did so, after waiting some hours, he took his ship in without one, in doing which she struck the ground and was lost by perils of the sea. The jury, on the facts, found that the master had acted with a wise discretion, and as a prudent man ought under the circumstances.² The Court, while agreeing in this verdict, intimated that, even had the facts been otherwise, and the loss had been remotely occasioned by the negligence or mistake of the master, yet, assuming him to have been originally a person of competent skill, the underwriters would have been liable, for the loss was proximately caused by the perils insured against.³

¹ In *Hollingworth v. Brodrick*, 7 J., 7 A. & E. 44, 48; and by Tindal, A. & E. 44. C. J., in 8 M. & W. 900.

² *Phillips v. Headlam*, 2 B. & Ad. 380; *Law v. Hollingworth*, 7 T. R. 160, as commented upon by Patteson,

³ *Phillips v. Headlam*, 2 B. & Ad. 383.

Law v. Hollingworth.

In the case of *Law v. Hollingworth*, the captain of a ship insured "from Stettin to London," took a pilot on board at Orfordness, but improperly allowed him to leave the ship at Halfway Reach; after which, and before she came to her moorings, the ship was lost. The Court held that the underwriters were not liable for this loss, on the ground that, at the time of loss, the ship was unseaworthy for want of a pilot,—“and,” Lawrence, J., adds, “owing to the negligence of the captain.”¹

Of this case, Patteson, J., says,—“In *Law v. Hollingworth* there was an intermediate voyage, if I may so say, constituted by Act of Parliament, upon which voyage the ship was not seaworthy unless she had a pilot;”² and Tindal, C. J.,—“The decision may be maintainable on the ground of an implied warranty to observe the positive regulations of an Act of Parliament; but if it is to be taken as an authority that the implied warranty on the part of the assured extends to acts of negligence on the part of the master and crew throughout the voyage, we think it cannot be supported against the weight of the later authorities.”³

Result of the cases.

At present the law in England upon this point must perhaps be taken to be, that, except where required by the positive provisions of an Act of Parliament, the captain's negligence in not having a pilot on board at any intermediate stage of the voyage, or in entering the port of destination, whereby a loss accrues, will not discharge the underwriters from their liability, if such loss be proximately caused by the perils insured against, and the master and crew were originally competent.

Coming out of port.

It seems to some to be a different question, whether it be a breach of this warranty for the master to sail out of any intermediate port, or from the out-port on his return voyage, without a pilot, where one is required by usage. Lord

¹ *Law v. Hollingworth*, 7 T. R. 160.

² In *Hollingworth v. Brodrick*, 7 A. & E. 44, *sed quere*.

³ Per Tindal, C. J., in delivering the judgment of the Exchequer Chamber, in *Sadler v. Dixon*, 8 M. & W. 900.

Tenterden answers it in the affirmative. "It may be conceded," says his Lordship, "that a vessel coming out of harbour must have a pilot, because the captain has it in his power always to procure one."¹

Whether in case of the pilot taken on board being disqualified notwithstanding the master's belief and his own representations to the contrary, the underwriters would be liable,² seems a question to be decided in the affirmative upon the principle of the later authorities, if the master was originally competent, and he acted to the best of his judgment, and the loss was directly caused by the perils insured against.

If pilot disqualified.

The great leading principle, therefore, of the English doctrine of seaworthiness is, that there is no implied warranty thereof except at the commencement of the risk. On this point the law in the United States is at variance with our own, and gives a wider range to the implied warranty; it being there held that the assured is bound not only to have his vessel seaworthy at the commencement of the risk, but to keep her so, as far as it depends on himself, during the continuance thereof, and at the commencement of all subsequent stages. The underwriters in the United States are therefore held discharged from any loss which can be distinctly shown to have arisen from the negligence or misconduct of the assured in not keeping the ship in a proper state of repair and equipment.³

In the United States.

Yet in that country unseaworthiness, arising after the commencement of the voyage, has, it seems, no retrospective operation in respect of losses accrued prior to the breach of the warranty; and it further seems to be the better opinion

¹ See the remarks of Lord Tenterden, in *Phillips v. Headlam*, 2 B. & Ad. 382. *Sed quare*, unless usage has the effect of creating an intermediate voyage, since this condition, satisfied at the commencement of the original voyage, ceases afterwards to

have any operation.

² See Lord Kenyon's judgment, 7 T. R. 162.

³ See the cases collected, 1 Phillips, Ins. no. 728-736; 3 Kent, Com. 288, 289; 1 Parsons, 380.

there, that if the ship sailed seaworthy for the voyage, subsequent unseaworthiness will not operate as a defence, except where the loss is distinctly occasioned by it, and the unseaworthiness itself have arisen from the negligence or misconduct of the assured or his agents. Where the loss is totally unconnected with the subsequent state of unseaworthiness, it cannot avail as a defence for the underwriters.¹

In Time policies no such warranty implied.

Hitherto we have been considering the nature and scope of the implied warranty of seaworthiness in relation to voyage policies only. It was for some time rather assumed than decided that there was no distinction, in this respect, between voyage policies and time policies.² The question was at length formally raised in the well-known case of *Small v. Gibson*, which was ultimately carried to the House of Lords.³

Small v. Gibson.

In that case to a declaration on a time policy on ship, the plea was, that the ship was not "at the time of the commencement of the risk, nor at the making of the said insurance, nor on the said 25th day of September, 1843 [the day on which the time mentioned in the policy began to run], seaworthy, or in a fit and proper condition to go to sea." On the question raised by this plea, the Court of Queen's Bench held, that there was an implied warranty of seaworthiness; the Court of Exchequer Chamber reversed this decision, and the House of Lords, acting on the opinion of the great majority of the judges, affirmed the judgment of the Exchequer Chamber.

¹ Ante, p. 659, n. 3. According to Mr. Parsons, breach may sometimes only suspend liability till seaworthiness be restored: 1 Parsons, 383; even although the unseaworthiness exist at the instant of the risk commencing; Phillips, no. 726.

² The case of *Dixon v. Sadler*, so frequently referred to, was a case upon a time policy. Mr. Cresswell, in his argument, distinctly contends that

such a policy implied no warranty of seaworthiness. Parke, B., adverts to this view with obvious favour, 5 M. & W. 414; but Tindal, C. J., delivering the judgment of the Court of Error, 8 M. & W. 895, 900, says that in this respect there is no difference between the two classes of policies.

³ *Small v. Gibson*, 16 Q. B. 128; *S. C.*, in Exch. Chamber, *ibid.* 141; *Gibson v. Small*, 4 H. L. Cas. 353.

The effect of this decision of the final Court of Appeal is thus stated in the judgment in *Thompson v. Hopper*. "It was there held (*i. e.*, in *Gibson v. Small*), that in a time policy on a ship, framed in the usual terms, no special circumstances appearing respecting the situation and employment of the ship, there is not an implied warranty that the ship shall be seaworthy on the day when the policy ought to attach." "So far," proceeds this judgment, "we are bound; but any opinion given upon the other question submitted to the judges must be considered extra-judicial, as they were not necessary to the decision of the case, and the House of Lords was not asked to act upon them."¹

The practical result in English Law of this celebrated decision has been, until recently, that in the Courts and in the commercial world policies have been so dealt with as if it were a received principle "that in all voyage policies, and in no time policies, there is an implied warranty of seaworthiness."²

Thus, in *Jenkins v. Heycock*, the judicial committee of the Privy Council, consisting of Jervis, C. J., Dr. Lushington, Sir J. Patteson, Mr. Pemberton Leigh, and Sir E. Ryan, although in the case before them they were not called upon so to determine judicially, yet intimated that they were strongly inclined to agree with those who thought that in time policies there never is any warranty of seaworthiness.³ Where a plea to a declaration on a time policy on ship, "at and from the meridian of the day of sailing from Suez,"—alleged that the ship "was not at the time of sailing from

Jenkins v. Heycock.

Michael v. Tredwin.

¹ Judgment of Lord Campbell, Coleridge and Wightman, JJ., in *Thompson v. Hopper*, 6 E. & B. 187; 25 L. J. (Q. B.) 246.

² See the judgment of the majority of the Court of Queen's Bench in *Thompson v. Hopper*, 6 E. & B. 186-192; 25 L. J. (Q. B.) 247; and of Lord Campbell (concurred in by Coleridge, J., and Wightman, J.) in

Fawcus v. Sarsfield, 6 E. & B. 199-205; 25 L. J. (Q. B.) 254. The expression in the text, to which this note is appended, occurs in the judgment in *Fawcus v. Sarsfield*, 6 E. & B. 202. So per Lord Wenaleyle, *Biocard v. Shepherd*, 14 Moo. P. C. 471.

³ *Jenkins v. Heycock*, 8 Moore, P. C. 351.

Suez, or at any time on the day of sailing, or any time during the continuance of the risk, seaworthy," the Court of Common Pleas, on demurrer, held that the plea was no answer to the action, and that the case fell within the most limited operation of the decision in *Gibson v. Small*.¹

*Thompson v.
Hopper.*

To a declaration on a time policy the plea was, that at the time the policy was effected, and down to the time of sending the ship to sea, she was an outward-bound ship, lying in a British port, where the plaintiffs (the owners) resided; that the ship was chartered for a voyage, and that the plaintiffs sent her to sea in an unseaworthy state, and that she was afterwards, while at sea, in that condition, lost.

On this plea, raising the very point which, in *Gibson v. Small*, Lord Campbell had said might be doubtful, and on which Lord St. Leonards had expressed an opinion against the underwriter's liability, the majority of the Court decided that the defence was no answer to the action; in other words, they held that even in this case, left most in doubt by the opinions of some of the Judges in the House of Lords, there was no warranty of seaworthiness in a time policy. The following passage from Lord Campbell's judgment, in which Coleridge, J., and Wightman, J., concurred, but from which Erle, J., dissented, puts the ground of the decision in a clear light:—

"We are now precluded from saying, in respect to time policies (as we do say with respect to voyage policies), that by a general rule there is an implied warranty of seaworthiness; and much uncertainty and much litigation would arise from the doctrine that it may be implied from special circumstances. Not only would there be great difficulty in determining what special circumstances shall be sufficient for the purpose, but a long course of decisions would be necessary to ascertain the period at which on time policies the seaworthiness must exist. I conceive that it would be much better to

¹ *Michael v. Tredwin*, 17 C. B. 251; 25 L. J. (C. P.) 83.

lay down the general rule, that in time policies there is no warranty of seaworthiness."¹

The additional fact that at the home port, where the ship is at the date of the policy, means existed for making her seaworthy, was held by the Court of Queen's Bench to make no difference in the relative position of the parties.²

This question, thus thought to have been finally set at rest, was again raised in *Dudgeon v. Pembroke*.³ The decision of the Court of Queen's Bench, that there was no implied warranty of seaworthiness in a time policy, was reversed by a majority of the Court of Exchequer Chamber (viz., Lord Coleridge, C. J., Cleasby and Pollock, BB., and Grove, J.; *diss.* Brett, J., and Amphlett, B.), and the case was carried to the House of Lords. There, Lord Penzance giving the reasons of the House for reversing the judgment of the Court below said, "The policy then being a time policy, the first question raised for your Lordships' determination is whether the law implied in such a contract any warranty that the vessel should be seaworthy at any period of the risk, and if so at what period or periods. This is no new question; it was raised in a case of *Gibson v. Small*, which was determined by your Lordships' House in the year, 1854, and has been the subject of more than one subsequent decision. I do not propose to trouble your Lordships by reviewing the arguments on this question, because I consider that the case of *Gibson v. Small*, supplemented as it was by the two cases of *Thompson v. Hopper* and *Fawcus v. Sarsfield*, must be considered to have set at rest the controversies on this subject, and to have finally decided that the law does not, in the absence of special stipulations in the contract, infer in the case of a time policy, any warranty that the vessel at any particular

Fawcus v. Sarsfield.

Dudgeon v. Pembroke.

¹ *Thompson v. Hopper*, 6 E. & B. 188; 25 L. J. (Q. B.) 249.

² *Fawcus v. Sarsfield*, 6 E. & B. 192; 25 L. J. (Q. B.) 249.

³ *Dudgeon v. Pembroke*, L. R., 9

Q. B. 581; 1 Q. B. Div. 96; 2 App. Cas. 284. See also *West India Telegraph Co. v. Home and Col. Ins. Co.*, 6 Q. B. D. 51, 57, 62.

time shall have been seaworthy. In pronouncing the judgment of a majority of the Court in the latter case, Lord Campbell said, 'For the reason which I gave in the case of *Gibson v. Small*, and which I have given in the case of *Thompson v. Hopper*, I think there is no implied warranty of seaworthiness in any time policy.' From that time, upwards of twenty years ago, up to the present, these decisions have been acted upon and submitted to, and thousands of time policies have been effected and millions in losses adjusted under them, and whatever may be argued as to the soundness of the conclusions then arrived at, or however desirable it may be as a matter of public policy and concern that some obligation of keeping his vessel as far as it is within his power seaworthy, should be cast on the ship-owner, the law must, I submit to your Lordships be considered as settled by these decisions, and any change made in it must be by legislative authority alone."

There are
degrees of sea-
worthiness.

We are accustomed to speak of this implied warranty as one; the condition, however, which is warranted admits of degrees which are distinctly recognised by the law. Seaworthiness for the voyage is one thing; and seaworthiness in port quite another; and seaworthiness for inland navigation, &c., may be altogether different.¹

Thus it is quite certain that a ship, under a policy, "at and from," might be seaworthy in harbour while undergoing repairs, though it is equally clear that she might not be seaworthy for the voyage, if she sailed in that condition.²

¹ *Forbes v. Wilson*, 1 Park, Ins. 472; 1 Marshall, Ins. 148; *Hibbert v. Martin*, 1 Park, Ins. 473; *Smith v. Surridge*, 4 Esp. 25; *Parmeter v. Cousins*, 2 Camp. 235; *Annen v. Woodman*, 3 Taunt. 299; and see per Parke, B., in *Dixon v. Sadler*, 5 M. & W. 414, and afterwards cited by himself in *Biccard v. Shepherd*, 14 Moo. P. C. 471, 491, and by Willes, J. in *Bouillon v. Lupton*, 33 L. J.

(C. P.) 37, 42; *Quebec Mar. Ins. Co. v. Commercial Bank of Canada*, L. R., 3 P. C. 234.

² *Forbes v. Wilson*, 1 Park, Ins. 472; *Smith v. Surridge*, 4 Esp. 25, before Lord Kenyon. Lord Ellenborough ruled the same point in *Hibbert v. Martin*, 1 Park, Ins. 473, and in *Parmeter v. Cousins*, 2 Camp. 235.

What that degree of seaworthiness is which is requisite to make a policy "at and from" attach upon a ship while in port, has nowhere been very accurately laid down. Under a policy "at and from," while in port. Generally speaking, it may be said that, under such a policy, a ship will be sufficiently seaworthy to give inception to the risk, if she be in such a state while "at" the port as to be capable of being moved from one part of the harbour to another for the purpose of repair, and of being moored alongside its wharfs or quays there in order to take in her cargo.¹

If the port "at and from" which the ship is insured be an outport, and the ship arrives there so shattered as to be a mere wreck,² or in such a state as to be unable "to lie there in reasonable security till she is properly repaired and equipped for the voyage,"³ the policy never attaches. Till seaworthy in port, policy does not attach.

If, however, the ship under such policy have once been "at" the port in a state commensurate with the risk of lying there to be repaired, or loaded for her homeward voyage, the policy attaches, and the assured is not entitled to a return of premium, as on a risk that never commenced, because the ship afterwards sailed from the port in a state of unseaworthiness for the voyage.⁴ "The condition that she shall be seaworthy for her voyage," says Lawrence, J., "does not attach till she sails."⁵ Secus if seaworthy.

Of course if she ultimately sails unseaworthy for the voyage, this, according to the rule already laid down, wholly discharges the underwriter from all liability for loss on the voyage, although the policy may have attached on her while "at" the port, owing to her having been there seaworthy for her then risk.⁶

¹ *Parmeter v. Cousins*, 2 Camp. 257; *Annen v. Woodman*, 3 Taunt. 299.

² *Shawe v. Felton*, 2 East, 109.

³ *Parmeter v. Cousins*, 2 Camp. 235. The law is the same in the United States, see cases cited, 1

Phillips, Ins. no. 695 et seq.; 3 Kent, Com. 289.

⁴ *Annen v. Woodman*, 3 Taunt. 299.

⁵ *Ibid.* 300.

⁶ *Parker v. Potts*, 3 Dow, 23; per Parke, *arguendo* in *Watson v. Clark*, 1 Dow, 336.

Different
degrees even
out of port.

But for the purpose of sailing, her condition may differ; as it is laid down by Parke, B.,—"if the voyage be such as to require a different complement of men, or a different state of equipment in different parts of it, as if it were a voyage down a canal or river, and thence across the open sea, it would be enough if the vessel were in each stage of the navigation properly manned and equipped for it."¹

Bouillon v.
Lupton.

A steamer insured "at and from Lyons to Galatz, to sail on or before the 15th of August," sailed from Lyons on the 24th of July with a river crew and captain, and without her masts, anchors, and other heavy articles which it was impossible for her to carry on board during the river voyage. At Arles she took on board her sea captain and some of her sea-going crew, and was otherwise fitted for the voyage to Marseilles where she must call for a licence. At Marseilles she was rendered seaworthy in respect of her crew and equipment, and she sailed thence on her voyage on the 23rd of August. It was held that the sailing from Lyons was a compliance with the warranty *to sail*, being in a condition then commensurate with the risk.²

And the same may take place, in virtue of a usage to that effect, even in different parts of a sea voyage, as for instance in the Greenland whale fishery, where it is always customary to take on board extra hands on arriving at Shetland; there can be no doubt that the ship in sailing from Hull to Shetland, would be seaworthy with a different equipment from that which would be required to make her so on sailing from Shetland to the North Seas.

If the ship were lost in these intermediate stages of the voyage, it would be no defence that she was not then seaworthy for a stage of the voyage which she had not commenced;³ nor, if lost in the course of her main voyage, could

¹ Per Parke, B., in *Dixon v. Sadler*, 5 M. & W. 414; *Biccard v. Shepherd*, 14 Moo. P. C. 471, 491; *Quebec Marine Ins. Co. v. Commercial Bank*

of Canada, L. R., 3 P. C. 234.

² *Bouillon v. Lupton*, 33 L. J. (C. P.) 37.

³ *Secus*, if the stage had been com-

the underwriters discharge themselves from liability by showing that, though seaworthy when she commenced such main voyage, she had yet sailed on its earlier stages with an inferior equipment.¹

Thus, where a ship insured "at and from New Orleans to Liverpool," was so much injured by worms while she lay in the mud of the river Mississippi that she would have been in an unfit state for her sea voyage, Lord Ellenborough held, that as she was then sufficiently seaworthy for the purposes of lying in the river, and the defect had been discovered and repaired before she sailed on her sea voyage, her prior state of unfitness for the sea did not avoid the policy.²

Oliverson v.
Loughman.

Seaworthiness is a term of relative import not only in respect of the hull, equipment, and crew of the vessel, but also in respect of her cargo. She may be seaworthy in that respect for one stage of the voyage, and unseaworthy for another. Under a policy on copper ore by *The Admiral Collingwood*, at and from the anchorages off Hondeklip Bay and Port Nolloth to Swansea, the vessel shipped 154 tons of ore at Hondeklip Bay, and sailed thence to Port Nolloth, where she shipped 250 tons of ore additional. Soon after sailing thence on her voyage to Swansea she became leaky and finally foundered at sea. It was found as a fact that she sailed seaworthy from Hondeklip Bay. On appeal to the Privy Council from the Courts in Canada, it was held that there were in fact two voyages insured; that the vessel being seaworthy at the commencement of the first, but unseaworthy through overloading at that of the second, the underwriters were liable for the ore on board during the first voyage, but not for the additional ore shipped for the

Seaworthy in
respect of
cargo and
stowage.

Biccard v.
Shepherd.

mened, for which she was not seaworthy, *Quebec Marine Ins. Co. v. Commercial Bank of Canada, L. R.*, 3 P. C. 234, 241.

¹ *Biccard v. Shepherd*, 14 Moo. P. C. 471.

² *Oliverson v. Loughman*, cited in 2 B. & Ald. 322. The law is the same in the United States, see *Treadwell v. Union Ins. Co.*, 6 Cowen, 270; and *Bell v. Reed*, 4 Binney, 127.

second.¹ Consequently it will not suffice that the ship can be made seaworthy in the course of the voyage, *e. g.*, by jettison or other destruction of the cargo if she sailed unseaworthy, for instance, by being overloaded.²

Seaworthy in respect of the class of ship.

Again the class of vessel may be such as will not admit of being put into that condition of seaworthiness requisite in ordinary cases for the contemplated voyage. The effect of this is not to dispense with the implied warranty of seaworthiness, but to accommodate the exigency of the warranty to what is reasonably practicable in the particular case. If a steamer, built for river navigation, is to be sailed from this country to Calcutta or to Odessa, and the underwriter accept the risk with full information as to the class of vessel and the intended voyage, the assured satisfies this warranty if he make her as seaworthy for the voyage as is reasonably practicable with such a vessel by ordinary available means.³ But he is bound to that much;⁴ and even such a description of the subject of insurance in the "slip," as that it is an "abandoned ship," does not dispense with this warranty and the assured's obligation under it.⁵

Whether in fact the vessel was in such a condition as satisfies this warranty in the particular case, is a question for the jury.⁶ But evidence of what that particular case is, may so directly contradict the express language of the policy as to be excluded, notwithstanding full information had been verbally supplied to the underwriter before taking the risk. This is a question of great importance agitated in the

¹ *Biccard v. Shepherd*, 14 Moo. P. C. 471; *S. C. nom. Commercial Marine Co. v. Namaqua Mining Co.*, 5 L. T., N. S. 504.

² *Daniels v. Harris*, L. R., 10 C. P. 1.

³ *Burges v. Wickham*, 33 L. J. (Q. B.) 17; 3 B. & S. 669; *Clapham v. Langton*, 34 L. J. (Q. B.) in error, 40.

⁴ *Turnbull v. Janson*, (C. P. Div.)

on appeal, 1 May; 1877, in which the Lords Justices held that for want of such reasonable strengthening of a river steamer for crossing the Atlantic, the policy had never attached: 36 L. T., N. S. 635.

⁵ *Knill v. Hooper*, 2 H. & N. 277; 26 L. J. (Ex.) 377.

⁶ *Knill v. Hooper*, *supra*; *Burges v. Wickham*, *supra*.

remarkable judgment of Blackburn, J., in *Burges v. Wickham*,¹ but not determined in that case, or in the subsequent case of *Clapham v. Langton*, although mentioned by the Court of Error.²

It is now obvious that there can be no fixed and positive standard of seaworthiness; but that it must vary with the varying exigencies of mercantile enterprise,—with the requirements for instance of the coasting or West India trade, as contrasted with the necessities of the Greenland Seas or the North West passage,—modified by the capabilities of a vessel constructed for a safer, but necessarily and temporarily exposed to a more dangerous traffic.³

What constitutes unseaworthiness.

Again, the standard of seaworthiness has been gradually raised in the course of the present century, in proportion as men have advanced in the skill and art of shipbuilding and navigation.⁴

It differs in different periods.

So again, a degree of equipment and preparation is deemed essential in some countries, which would be considered superfluous in others; in such cases it has been held in the United States, that seaworthiness is to be measured by the standard in the ports of the country to which the vessel belongs, rather than by that in the ports of the country where the insurance was made.⁵ “It seems to me,” says Story, J., “that where a policy is underwritten on a foreign vessel, belonging to a foreign country, the

Query, whether it varies also according to the country to which the ship belongs.

¹ Ubi supra. It is advisable in such cases to insert a word or words in the policy descriptive of the class of vessel, *e. g.*, “river steamer,” “coasting steamer,” and thereby remove any question as to the admissibility of evidence to modify the exigency of the implied warranty. Certainly the presumption from such language on the face of the policy as “The Jane steamer,” “at and from London to Calcutta,” is that she is

an ordinary sea-going vessel, capable of being made perfectly fit for such a voyage.

² *Clapham v. Langton*, 34 L. J. (Q. B.) 46.

³ See *Knill v. Hooper*, 2 H. & N. 277; 26 L. J. (Ex.) 377; per Curiam, *Burges v. Wickham*, 34 L. J. (Q. B.) 46.

⁴ 3 Kent, Com. 288.

⁵ *Ibid.*

underwriter must be taken to have a knowledge of the common usages of trade in such country as to equipments of vessels of that class, for the voyage in which she is destined."¹ This rule appears full of good sense and equity, and worthy of adoption in our own jurisprudence.

Bearing these observations in mind we proceed to examine what has been held by the Courts as constituting unseaworthiness for the voyage; considering, first, those cases in which the unseaworthiness has arisen from something defective in the state of the ship, and secondly, those in which it has arisen from deficiency or incompetency in the master and crew.

As to the hull, stores, and rigging of the ship.

The implied warranty of seaworthiness, as far as relates to the condition of the ship, requires that when the ship sails on her voyage she should be well furnished, tight, sound, staunch and strong; competent, that is, in her hull, to resist the ordinary attacks of wind and weather on the voyage insured, and properly rigged, stored, and provisioned for such voyage. If she be not so competent, the ship is not seaworthy.

Found unseaworthy soon after sailing.

If in a short period after sailing on the voyage, she become leaky and founder, or is obliged to put back or run for a port of distress, without encountering any extraordinary peril, or other visible cause to produce such effect, there arises a presumption of fact that she was not seaworthy when she sailed.² If in such a case it be found on survey that the leakiness arose from loosening of her timbers owing to the decayed state of her bolts and fastenings, this is, generally speaking, a clear case of unseaworthiness.

The *Mills* frigate cannot be supported.

That is admitted to have been the condition of *The Mills* frigate, under a policy "at and from the Leeward Islands to

¹ Per Story, J., in *Tidmarsh v. Washington Ins. Co.*, 4 Mason's Rep. 439; 1 Parsons, 134, 386.

² *Munro v. Vandam*, 1 Park, Ins. 469. Per Lord Kenyon, *Watson v.*

Clark, 1 Dow, 344. See such a case mentioned by Willes, J., where, however, the jury found against the presumption, *Wilson v. Jones*, L. R., 2 Exch. 143.

London," which, without encountering any bad weather became so leaky the day after she put to sea, that she was obliged to run for a port of distress, where she was condemned as irreparable. The Court of Exchequer, nevertheless, gave judgment for the plaintiff, and the Court of Error affirmed the judgment.¹ Mr. Park states that the judgment of the Court below proceeded upon this, that although unseaworthy for the voyage when she sailed, yet being seaworthy at the commencement of the risk in port while loading, this was sufficient under a policy "at and from." It is unnecessary to say that an argument proceeding on such a basis could not now be sustained.²

Under a policy "at and from Honduras to London,"³ the ship lay at Honduras about five months, taking in a cargo of mahogany and logwood, during which period she appeared to be in a seaworthy state. The day after sailing she encountered a gale of wind, and was making 10½ inches water per hour; the leakiness increased day by day for a week afterwards, and then she was making 3½ feet water per hour; and another gale coming on, she strained so much that the captain bore away in distress for Montego Bay, Jamaica. There a survey was had, and the report was, that her iron fastenings were decayed, three of her beams broken, the main beam in two places; that she was making eighteen inches water per hour, from the loose state of the ship throughout; and that she had evidently spread, having no support for her lower deck from knees, either fore or aft or otherwise. Upon this evidence, irrespective of the want of knees, Lord Eldon was clearly of opinion that the ship had been unseaworthy when she sailed from Honduras, and, consequently, that the underwriters were not liable.⁴

Parker v.
Potts.

¹ Mills v. Roebuck, 1 Marshall, Ins. 154; 1 Park, Ins. 460.

² Parker v. Potts, 3 Dow, 23; Watson v. Clark, 1 Dow, 336; Biccard v. Shepherd, supra, p. 667.

³ The insurance in terms was on freight, "beginning the adventure at Honduras, until the said ship, with

her goods and merchandise, should be arrived in London." It was assumed throughout the argument, and not disputed by Lord Eldon in his judgment, that this amounted to an insurance "at and from."

⁴ Parker v. Potts, 3 Dow, 23.

Watt v.
Morris.

A vessel originally of 80 tons burden had been lengthened so as to be of 110 tons; but the mainhold beams in the centre, where she had been cut asunder and lengthened, were not supported or strengthened by knees; no new anchor, sails, or rigging were provided, and the old anchor, sails, and rigging were insufficient for the altered ship; she had, besides, no stove in the cabin, though that was said to be essential for winter risks in the Baltic, such as she was then on. Upon this state of facts, but principally on the ground of the want of knees, Lord Eldon held that the ship was not seaworthy when she sailed from St. Andrew's.¹

Douglas v.
Scougall.

A ship, insured "from Leith to Pictou," was repaired at Leith to the amount of about 280*l.*, which the carpenters certified covered every repair deemed necessary for her voyage. This was in April; on the 23rd of May she sailed, and on the 6th and 7th of June she encountered a severe gale of wind, in which she sprung her bowsprit, and began to make so much water that the crew could not keep her free with both pumps, and the master in distress bore up for Greenock. There it was found that the iron work in general was very much decayed and had worked loose; the timbers and planks, generally speaking sound, but decayed about the bolts and nails, which in several places were quite gone. Several of the lower deck beams and knees were decayed and sprung, and one plank below the lower deck beams, on each side, decayed; the report also stated, "that the bowsprit was sprung and the stem had worked loose, on account of the decayed iron, and labouring of the ship at sea." Upon this state of facts Lord Eldon was clear that this vessel was not seaworthy when she sailed.²

Overloading
and want of
trim.

If a ship is so heavily, or so improperly loaded, when she sails on the voyage insured, as to be incapable of encountering the voyage, that is unseaworthiness.³

Besides being competent in hull to resist the ordinary

¹ Watt v. Morris, 1 Dow, 32.

² Douglas v. Scougall, 4 Dow, 269.

³ Daniels v. Harris, L. R., 10

C. P. 1; Biccard v. Shepherd, 14

Moo. P. C. 471; Foley v. Tabor, 2

F. & F. 662.

attacks of wind and weather on the voyage insured, she must be properly equipped with sails, ground tackling, stores, provisions, and all other things which the custom of trade has made requisite for the voyage. Rigging,
stores, and
provisions.

A ship, insured "at and from Jamaica to London," was held unseaworthy, because, at the time of sailing, although her storm-sails were in good condition, yet her maintop-gallant and studding-sails were extremely rotten and unserviceable. And the assured, on this ground, was held to be precluded from recovering, though the ship went down in a hurricane, in which such sails would have been useless.¹ Rotten sails.

A vessel insured at and from Montreal to Halifax in Nova Scotia sailed with a defective boiler, but the defect did not appear until she had passed into salt water; and then it became necessary to put back and to repair the boiler; after sailing again she encountered bad weather, and was lost by perils of the sea. It was held, however, that the vessel was not seaworthy, at all events at the stage when she passed into salt water, and consequently that the underwriters were not liable.² Defective
boiler.

A vessel is unseaworthy if she is not provided with ground tackling sufficient to encounter the ordinary perils of the sea; as where a ship sailed with the cable of the small bower anchor so worn and decayed as to be unfit for service, and with a best bower anchor too light, and too short in the shank for a vessel of her tonnage.³ Ground
tackling.

Where one of the rules of a mutual insurance society required the managing underwriters to survey the hull and materials of each ship once a year, and order whatever stores or repairs they deemed necessary, and declared that, unless such stores and repairs were provided, "the ship should not be insured;" the Court of Exchequer held that a failure to provide such stores and repairs made the ship unseaworthy.⁴ Club rules.

¹ Wedderburn v. Bell, 1 Camp. 1.

² Wilkie v. Geddes, 3 Dow, 57.

³ Quebec Marine Ins. Co. v. Commercial Bank of Canada, L. R., 3 P. C. 234.

⁴ Stewart v. Wilson, 12 M. & W. 11.

Proper medicines.

Stores and supplies for the voyage are so principal an element in seaworthiness that Lord Eldon at *Nisi Prius* declared it to be his opinion that the assured was as much bound to show he had provided proper medicines and necessaries for the voyage, as to establish the tightness of the ship.¹

Fuel and candles.

In the United States a vessel not properly supplied with fuel and candles, has been held not to be seaworthy.²

Compass unadjusted.

In one case in the United States, where a vessel ran on a rock, in consequence of the needle of the compass being deflected from its proper direction two or three points by an iron fastening, near which the compass was placed, it was contended that this was unseaworthiness; but the Court, on evidence being given that there was no negligence in this case in the construction of the ship, were of opinion that it was not so.³

There can hardly be a doubt that the proper adjustment of the ship's compass, especially in iron vessels, will become, as we grow familiar with the principles on which this is effected, an essential element of seaworthiness.

A competent master and crew.

We come now to consider that kind of unseaworthiness which consists in the deficiency or incompetence of the crew.

Every ship at the time of sailing, must be also properly equipped with a master and mate of competent nautical skill, a crew sufficient to navigate her on the voyage insured, and perhaps a pilot on board whenever required by law.

1. Of the master.

First, of the master.—He must be a person sufficiently well acquainted with the usual course of navigation on the voyage insured, to be able to conduct the vessel in safety through its ordinary perils; and if he is grossly ignorant of that, the ship is not seaworthy.

Tait v. Levi.

Thus a ship was insured on a voyage "from Cork to the ship's loading port or ports on the coast of Spain within the

¹ Woolff v. Claggett, 3 Esp. 258.

² Fontaine v. Phœn. Ins. Co., 10 Johnson's N. Y. R. 58.

³ Stanwood v. Rich, Massachusetts, Nov. 1817, cited 1 Phillips, Ins. no. 701.

Straits of Gibraltar, including Tarragona, and not higher up the Mediterranean," and the captain, through entire ignorance of the coast, mistook Barcelona for Tarragona, and was captured in endeavouring to enter the former port, which is higher up the Mediterranean than Tarragona, and was then in possession of the forces of Napoleon. The Court considered this a breach of the implied warranty to provide a master of reasonably competent skill.¹

Under a policy "from Mauritius to London," the captain Mates. on sailing from Mauritius was very ill, and next day, feeling himself, from increased illness, incompetent to the charge of the ship, he inquired of his two mates whether they could manage the voyage to England, but, finding no one competent to undertake it, he put back; Lord Tenterden, on this evidence, asked the jury, "whether they thought, considering the length of the voyage from Mauritius to England, that a ship could be sufficiently manned, when, in the event of any accident to the captain, there was no one else on board able to perform his duties;" the jury, which was special, found for the underwriters.²

Mr. Chancellor Kent questions the soundness of this doctrine in any case, and observes, that the warranty of seaworthiness "would seem to imply no more than that the assured must have a sound and well-equipped vessel with reference to the voyage, and have on board a competent person as master, a competent person as mate, and a competent crew as seamen;" he also cites American cases in which Lord Tenterden's doctrine has been discarded, as far as regards the American coasting and West Indian trade.³

The doctrine thus impugned would undoubtedly operate with a good deal of harshness, if enforced with regard to short voyages, or vessels of small burden, but the very basis on which it was originally rested is the length of the voyage, and to similar voyages of great length probably it ought to

¹ *Tait v. Levi*, 14 East, 481.

Malk. 103; 3 C. & P. 16.

² *Clifford v. Hunter*, 1 Mood. &

³ 3 Kent's Com. 287, note (a).

be confined. In this view the doctrine of the decision is received by Mr. Phillips.¹

Want of
certificate.

A question, which we have looked at once or twice heretofore,² and shall but refer to in this place, is whether the shipping an uncertificated master or mate or engineer, in contravention of the statutes, would amount to unseaworthiness. Viewed in the light of decisions on questions of a kindred nature, it would seem to be an illegality which, in case of privity on the part of the assured, would avoid the policy, and probably it may be found to amount also to unseaworthiness.³

2. As to the
crew.

Secondly, as to the crew.—"The owner," says Lord Tenterden, "as a condition precedent is bound to provide a crew of competent skill,"⁴ and "adequate," says Lord Ellenborough, "to discharge the usual duties, and to meet the usual dangers to which she is exposed."⁵

If the crew be sufficient when the ship sails on the voyage insured, the implied warranty is fully satisfied, unless it be a voyage of successive stages differing in degree of risk, and consequently in the description of crew required on board.⁶ The assured does not contract that the ship shall continue to be properly manned throughout the voyage, nor is he responsible for any subsequent negligence or misconduct on the part of the crew.⁷

But, that the ship should be properly manned for the

¹ 1 Phillips, Ins. no. 708.

² See ante, Part I., Chap. VII., p. 344. The 136th clause of the Merchant Shipping Act of 1854 (17 & 18 Vict. c. 104) provides, that no foreign-going ship or home trade passenger ship shall proceed to sea without certificated master and mate, nor any home trade ship without a certificated master. So, by 25 & 26 Vict. c. 63 (Shipping Act, 1862), s. 5, steamers within the above section are required to have a certificated engineer, or engineers.

³ See cases, ante, p. 345, and post,

Part II., Chap. V.

⁴ Shore v. Bentall, 7 B. & Cr. 798, note.

⁵ In Hunter v. Potts, 4 Camp. 203.

⁶ Bouillon v. Lupton, 33 L. J. (C. P.) 37.

⁷ Busk v. Royal Exch. Co., 2 B. & Ald. 73; Walker v. Maitland, 5 B. & Ald. 171; Bishop v. Pentland, 7 B. & Cr. 214; Holdsworth v. Wise, ibid. 794; Shore v. Bentall, ibid. 798, note; Dixon v. Sadler, 5 M. & W. 405; S. C. in error, 8 M. & W. 895.

voyage at the time she sails on it, is indispensable, since otherwise the underwriters are not liable. Thus, under a policy "at and from Cuba to Liverpool," without any leave given to touch and stay in the original policy, the captain having lost some of his outward crew by sickness and desertion at Cuba, and finding it impossible there to engage ten men, his proper complement for Liverpool, sailed from Cuba with only eight men engaged for Liverpool, and two for Montego Bay (Jamaica), at which place he touched, landed the two men, and, having procured others to supply their place, proceeded on his voyage to Liverpool. The Court held that the ship was not seaworthy when she sailed from Cuba for a voyage to Liverpool, as she ought then to have had on board a full complement of men engaged for the whole voyage.¹

Thirdly, as to the pilot.—On this question, so fully considered already, we shall refer to a previous page² for details, adding only the general result of the cases as they now stand. 3. As to the pilot.

The law seems to be, that, supposing the ship to have been seaworthy when she sailed, and provided with a competent master and crew, the underwriter is liable for all loss proximately caused by the perils of the sea, although remotely occasioned by the negligence or misconduct of the master in entering, without a pilot, an intermediate port where pilots may be had, and usage requires one to be taken on board for that purpose;³ *a fortiori* he is so liable, if the master on arriving off the port have done his best to procure a pilot to come off, and has only entered the harbour without one when it became the wisest course for him, as a prudent and skilful man, so to do.⁴ Result of the cases.

If not only usage, but the positive regulations of an Act of Parliament, require a pilot to be taken on board on entering either an intermediate or a home port, then it has been

¹ *Forshaw v. Chabert*, 3 Br. & B. 158.

² *Ante*, p. 656.

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³ *Phillips v. Headlam*, 2 B. & Ad. 380.

⁴ *Phillips v. Headlam*, *ubi supra*.

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held in one case to be unseaworthiness to be found within the statutory limits without one.¹

And in all cases where it is necessary, either by law or usage, for the master to have a pilot on board in going out of an intermediate port, or in clearing from his outport homewards, it is, in the opinion of some learned judges, unseaworthiness not to take one, for it is in such cases always in his power so to do.²

Lighters no part of the ship for the purpose of this warranty.

An attempt was made recently to extend the warranty of seaworthiness beyond the ship, her furniture and equipment, to the lighters employed in loading or landing the cargo, whenever through usage or express stipulation the risk of craft is included within the policy; but the attempt signally failed.³

Of the proof of unseaworthiness.

Where a ship soon after sailing becomes so leaky or otherwise disabled as to be unable to proceed, or founders without any apparent cause sufficient to account for it, the fair presumption seems to be, that it arose from causes existing at the time of her sailing, and consequently that she was not then seaworthy. That, however, is but an inference from the facts, and not a presumption of law.⁴ Yet if such inference of fact be well founded, it has the effect of shifting the burden of proof, that is, to rebut it, to the plaintiff, the assured.⁵

¹ *Law v. Hollingworth*, 7 T. R. 160. In this case the ship had discharged the pilot at a point beyond which he was still required by statute to be on board.

² Per Lord Tenterden in 2 B. & Ad. 382.

³ *Lane v. Nixon*, L. R. 1 C. P. 412.

⁴ *Pickup v. Thames Ins. Co.*, 3 Q. B. D. 594; where Field, J., seems to have put it to the jury as a presumption of law.

⁵ Per Cockburn, C. J., and on appeal, per Brett and Thesiger, L. J.J., in *Pickup v. Thames Ins. Co.*, *supra*; and see per Lord Eldon, *Watson v. Clark*, 1 Dow, 344; *Munro v. Vandam*, 1 Park, Ins. 469; per Willes, J., in *Wilson v. Jones*, L. R. 2 Exch. 143, and in *Davidson v. Burnand*, L. R. 4 C. P. 117, 120. See the case of *Anderson v. Morice*, L. R. 10 C. P. 58; on appeal, *ibid.* 609; and in the Lords, 1 App. Ca. 713.

If, on the other hand, the loss takes place long after sailing, or under such circumstances that it may fairly be attributed, *primâ facie*, to the violent and immediate action of the winds and waves or other perils insured against, then, the *onus probandi* of unseaworthiness is on the defendant who sets it up in his defence.¹ But even the prevalence of stormy weather, dangerous seas, stiff breezes, or severe gales, is not enough, if the state of the vessel when examined is wholly unexplained by it.²

Of course, if there be a clause in the policy admitting the seaworthy state of the ship on sailing, the underwriters are thereby precluded from setting up the contrary to an action on the policy, in the absence of fraud on the part of the plaintiff in obtaining this admission.³

With regard to the means of proving that the ship was seaworthy, or the reverse, the only satisfactory evidence is that of the persons who were employed to survey and examine the vessel. After their evidence has been given, however, experienced shipwrights, although they never saw the ship, may be called to say whether, upon the facts sworn to, she was in their opinion seaworthy or not.⁴

The sentence of a Vice-Admiralty Court, ordering a sale of the ship for unseaworthiness and irreparability, is no evidence of the facts or grounds on which the condemnation proceeded.⁵

The whole question as to what amounts to seaworthiness is peculiarly a question for a jury; and hence, where a special jury of merchants had twice given their verdict one way on

¹ Per Blackburn and Lush, JJ., in *Wilson v. Jones*, L. R. 2 Exch. 139, 143; and per Thesiger, L. J., in *Pickup v. Thames Ins. Co.*, 3 Q. B. D. 604.

² *Watson v. Clark*, 1 Dow, 336; *Parker v. Potts*, 3 Dow, 23; *Douglas v. Scougall*, 4 Dow, 269; and see *Foster v. Steele*, 3 Bing. N. C. 892.

³ *Parfitt v. Thompson*, 13 M. & W. 392; *Phillips v. Nairne*, 4 C. B.

343.

⁴ Per Lord Kenyon, *Thornton v. Royal Exch. Co.*, Peake, 25; per Lord Ellenborough, *Beckwith v. Sydebotham*, 1 Camp. 116.

⁵ *Wright v. Barnard*, 1 Marshall, Ins. 152; 2 Park, 863; *Reid v. Darby*, 10 East, 143; *The Margaret Mitchell*, 4 Jur. N. S. 1193; *The Eliza Cornish*, 1 Ecc. & Ad. R. 36; and see *Mac-lachlan, Shipping*, 157, 158.

a question of seaworthiness, the Court, although they considered the verdict not altogether satisfactory, refused to grant a rule for a third trial:¹ nor would they allow the consolidation rule to be opened, in order to try the same question in another action against another underwriter on the same policy.²

Ship must be properly documented.

Evidence of national character.

If a ship be not provided with those documents which are required by the general law of nations, or by international treaties, to prove her national character, she is exposed, especially in seasons of general maritime war, to the danger of being condemned for the want of them. It is, therefore, an implied condition in every policy effected with the ship-owner, that the ship in the course of the voyage and at the time of seizure shall have on board all such documents, whether her national character be, or not, the subject of warranty or representation in the policy. It is not, however, requisite that they should be on board when she sails, unless she is represented or warranted as of a particular national character.³

Differs as to consequences from unseaworthiness.

The consequences, however, of a failure to comply with this implied condition, are very different from those that follow upon a breach of the implied warranty of seaworthiness.

The warranty of seaworthiness, in the words of Mr. Justice Lawrence, "is implied from the very nature of a contract of insurance; the consideration of an insurance is paid in order that the owner of a ship which is capable of performing her

¹ *Foster v. Steele*, 3 Bing. N. C. 892; *Foley v. Tabor*, 2 F. & F. 662.

² *Foster v. Alvez*, 3 Bing. N. C. 896.

³ Unless the ship be warranted or represented as of a particular nation, she need not sail with documents of neutrality; per Lord Ellenborough,

Bell v. Carstairs, 14 East, 374, 393, 394; *aliter*, if there be such a warranty or representation; *Rich v. Parker*, 7 T. R. 705. By the 102nd section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), the national character of every ship is to be declared before clearance.

voyage may be indemnified against certain contingencies, and it supposes the possibility of the underwriters gaining the premium; but if the ship be incapable of performing the voyage, there is no possibility of the underwriters gaining the premium; and if the consideration fails the obligation fails. But that is not the case with a ship not having proper documents on board: she may nevertheless perform the voyage; at least there is no certainty that she will not, as there is in the case above alluded to.”¹

Accordingly, it is established that a want of proper documents on board discharges the underwriter from his liability only when the sentence of the foreign Prize Court shows that the condemnation proceeded expressly upon that as the sole ground, or as one of the grounds;² and by Lord Ellenborough, uncontradicted by any subsequent authority, it is held even in this case that the underwriter is not discharged unless his contract was with the owner of the ship, from whom he had a right to expect, and who had the power to provide, that she should have on board all documents required for her protection.³

First, to be a ground of discharge to the underwriter it must distinctly appear, from the whole of the foreign sentence taken together, that it proceeded in part or in whole on the want of such documents.

1. The foreign sentence must obviously proceed on this.

Already we have seen that our Courts before giving any such effect to such a sentence at one time required that the ground should be stated in the judicative clause.⁴ A more reasonable canon of construction was adopted afterwards,

¹ Per Lawrence, J., in *Christie v. Secretan*, 8 T. R. 192. See also the observations of the Court in *Price v. Bell*, 1 East, 663. So in the United States, Chancellor Kent (then Ch. J.) intimated that it was no part of the implied warranty of seaworthiness that the ship should be properly documented, on the ground “that

the vessel, without such documents, might be quite competent to perform the voyage;” *Elting v. Scott*, 2 Johnson’s Rep. 157.

² See the remarks of Lawrence, J., in *Price v. Bell*, 1 East, 663, 673.

³ *Dawson v. Atty*, 7 East, 367.

⁴ *Christie v. Secretan*, 8 T. R. 192. See ante, p. 643.

and still continues to be in use, that if, upon examination of the whole sentence taken together, it appears that want of proper documents, as required by treaties, was one of the alleged grounds on which the sentence of condemnation proceeded, our Courts will consider the sentence proof that the assured has failed to comply with the implied condition, and hold the underwriter discharged from his liability.¹

Bell v. Carstairs.

Consequently, where an American ship (not warranted American) was condemned in a French Court of Prize on the express ground, alleged in the premises of the sentence, that she was not properly documented according to the existing convention between the French Republic and the United States, Lord Ellenborough held, that the underwriters on ship were discharged from their liability, although the sentence also proceeded on the ground of a suppression of papers by the master after her capture.²

Steel v. Lacy.

So, where an American ship, which had sailed from New York to London with naval stores, was chartered from London for a voyage to the Baltic during the maintenance of Napoleon's continental system, and ultimately condemned in a Danish Prize Court, for want, amongst other grounds, of sea passport and muster rolls, the Court held the underwriters discharged from their liability, although if the ship had produced her sea passport it would have subjected her to French condemnation under the Berlin decree, as showing that she had last come from London.³

2. That the lacking document is required by law.

Secondly, this implied condition extends to no documents except those required by the general law of nations, or by subsisting international treaties; for the purpose of this defence, therefore, it must be clearly made out that the wanting documents fall within one or other of these two categories.⁴

¹ *Bell v. Carstairs*, 14 East, 374; *Bell v. Bromfield*, 15 East, 364; *Steel v. Lacy*, 3 Taunt. 285.

² *Bell v. Carstairs*, 14 East, 374.

³ *Steel v. Lacy*, 3 Taunt. 284. The ship had been represented American.

⁴ Per Bayley, J., in *Bell v. Bromfield*, 15 East, 368.

Hence, where an American ship was condemned on the *Price v. Bell* express ground that she was not so documented as was required by certain recent French Ordinances, which were contrary to the terms of the treaty then subsisting between France and the United States, and not adopted by any public international act of the two governments, it was held that the underwriters were not discharged from their liability.¹

Again, where an American ship was condemned in a Danish Prize Court because her sea passport was not verified with the notary's name and seal of office, the Court called upon the counsel for the underwriters to show by what rule of the law of nations, or by what clause in any subsisting treaties between Denmark and the United States, it was required that the sea passport of an American ship should be so verified.²

A register is not a document required by the law of nations, as evidence of a ship's national character; hence, where a ship described in the charter-party as a Pappenburgher, was condemned in a Danish Prize Court "for want of a Pappenburgh register," the Court held that the underwriter, in order to discharge himself from liability, must show that a register was required as a proof of national character by some subsisting treaty between Denmark and the country to which the ship belonged.³ "We want evidence," says Mansfield, C. J., in giving judgment against the underwriters, "to show on what reasons the want of this register was made a ground of condemnation."

Thirdly, it is laid down by Lord Ellenborough after full consideration, that this implied condition in favour of the underwriter is of force only when the insurance is effected for the shipowner, and not for the owner of the goods.

Thus, where, from an omission of the captain, goods insured for a voyage from this country to a foreign port were

Bell v. Bromfield.

Le Cheminant v. Allnutt.

3. This defence is open only as against the shipowner.

Carruthers v. Gray.

¹ *Price v. Bell*, 1 East, 663.

³ *Le Cheminant v. Allnutt*, 4

² *Bell v. Bromfield*, 15 East, 364.

Taunt. 367.

not mentioned in the ship's manifest, as required by Act of Parliament: but it did not appear that the loss was in any degree owing to this defect; Lord Ellenborough held the underwriters liable, on the ground that there was no implied warranty, on the part of the owner of the goods, that the ship should be properly documented.¹

Dawson v.
Atty.

So, where the policy was "on goods" on board a ship, which was in fact, but not represented to be, an American, and the ship, being captured by the Spaniards, was condemned on the express ground of her not being properly documented according to the treaties then subsisting between Spain and the United States, Lord Ellenborough held that the underwriters were not discharged on this account;² and on this case being mentioned in that of *Bell v. Carstairs*, his Lordship supported it, on the ground that it was the case of an insurance on goods, "where the owner of the goods has no concern in the obtaining of the proper documents with which the vessel is to be furnished for the voyage:" whereas in a policy on ship, "the shipowner is bound to have such documents as are required by treaties with particular nations to evince his neutrality in respect of such nations."³

Confirmed in
Bell v. Car-
stairs.

Remarks on
this limitation
to the general
doctrine.

Mr. Marshall⁴ and Mr. Phillips⁵ seem to consider this distinction a very questionable one, upon the ground that the assured on goods might as well contend that the unseaworthiness of the ship was no answer to his claim upon the underwriter. But as, according to authorities cited at the

¹ *Carruthers v. Gray*, 3 Camp. 142; *S. C.* 15 East, 35. Accord. *Hobbs v. Henning*, 34 L. J. (C. P.) 117, 122; 17 C. B. N. S. 791.

² *Dawson v. Atty*, 7 East, 367; see also *Carruthers v. Gray*, 3 Camp. 142.

³ In *Bell v. Carstairs*, 14 East, 374, 393.

⁴ *Marshall, Ins.* 173, note (a). See also the remarks of Mansfield, C. J., in *Le Cheminant v. Pearson*, 4 Taunt. 367, 379.

⁵ *Phillips on Ins.*, vol. i. p. 344, 2nd ed. In the 3rd, 4th, and 5th editions Mr. Phillips appears to modify his objection, as stated in the text, and admits that, as regards the mere shipper, it is going far enough to put the case upon the ground of representation and concealment; i. e., to make it the shipper's duty to disclose want of documents, &c., if known to him and not to the underwriter, 1 *Phillips*, no. 746.

commencement of this article, there seem good grounds for holding, that the implied condition that the ship shall be properly documented stands on a wholly different footing from the implied warranty of seaworthiness, these objections, which proceed upon the assumption of a complete analogy between the two cases, are not entitled to much weight. The distinction taken by Lord Ellenborough, and since adopted by the Court of Common Pleas,¹ seems to rest on a very satisfactory foundation, nor does there appear to be any reason why the implied condition as to proofs of national character ought to be more widely extended.

Owing to the unexampled difficulties thrown in the way of English commerce during the great French wars, it became necessary to carry on trade with the continent by the aid of simulated papers; yet our Courts uniformly held that the sentences of foreign Prize Courts proceeding expressly on the ground of the ship's carrying such papers, were conclusive to discharge the underwriter from his liability, except where there was an express licence in the policy to carry them.

Of carrying simulated papers and false clearances.

Thus, where a British ship sailed from London for the Baltic, and was condemned in a Russian Prize Court on the ground of carrying simulated papers, Lord Ellenborough and the Court of King's Bench held, that, as the policy contained no liberty to carry such papers, the assured could not recover; yet it was notorious that the trade protected by the policy could be carried on in no other way, and that the possession of such papers on board actually tended to diminish the risk.² The decision of the Court was the same where the fact of carrying such papers appeared by the sentence to be at least one of the efficient causes of condemnation.³

Without leave of the underwriter.

¹ *Hobbs v. Henning*, *supra*.

² *Horneyer v. Lushington*, 15 East, 46; 3 Camp. 85; see also *S. P. Fomin v. Oswald*, 3 Camp. 357; 1 M. & Sel. 393. These cases resolve in the affirmative a point left open by the Court of Common Pleas in *Steel v.*

Lacy, 3 Taunt. 285, viz., whether it is necessary to have permission in the policy to carry simulated papers, in cases where it is notorious that the trade cannot be carried on without them.

³ *Oswell v. Vigne*, 15 East, 70.

Aliter, where
leave to that
effect is
reserved.

Of course, if the underwriters have themselves inserted in the policy a licence to carry simulated papers, they are not discharged by a condemnation proceeding on that ground. Thus, where an American ship having sailed from London on a Baltic risk under a policy which contained an express licence "to carry simulated papers," was subsequently condemned by the sentence of a Danish Prize Court, which proceeded mainly on the ground of the ship's having carried such papers, Lord Ellenborough and the Court of King's Bench held, that the underwriters were not discharged from their liability.¹

Legality of
the adventure

Another warranty implied by the law in the policy is that the adventure insured shall be in its own nature and in the manner and means by which it is pursued, in accordance with law. But the importance of the subject, the modifications that affect it, and the classes of illegal acts deserving of consideration, although in some respects beyond the scope of this warranty, make it desirable to bring the whole into view in a separate chapter.

¹ Bell v. Bromfield, 15 East, 364.

CHAPTER V.

ILLEGALITY.

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No species of property or interest at risk on a sea venture can be the subject of a valid contract of marine insurance, if the course of trade, or the voyage, in the prosecution of which it is so exposed to risk, be in contravention either of the laws or the war policy of the country of the insurer. We shall treat of these several kinds of illegal risks in their order, after having first stated generally how the illegality of the risk affects the rights and liabilities of the parties to the policy.

Division of
the subject.

There is a third class of illegal risks, however, in respect of which this term "illegality" is used in a very modified signification. In these cases this term denominates such a contravention of international law in respect of other parties as entitles them legally to take and confiscate the property embarked in the adventure. At the same time, this right in these others is not incompatible with the existence of right derived under a different law to the adventurers for the course which they were pursuing when their property was confiscated. These are the conflicting rights of peace and war in presence of each other; the neutral, in virtue of the former, being justified in prosecuting the objects of commercial enterprise,

the belligerent, in enforcing the latter if such commercial pursuits are in effect an intervention in subsisting war. A policy on such an adventure is not necessarily invalid, provided the underwriter was informed of the aggravated nature of the risk which he was assuming, and that it was not assumed in contravention of the war policy of his own government.

We shall advert to this modified view of illegality before the close of the chapter; meanwhile we proceed to consider illegality in its proper signification and in its effect upon the contract of marine insurance.

General doctrine of the illegality of the risk as it affects the policy.

"Where a voyage is illegal," says Tindal, C. J., "an insurance upon it is invalid; for it would be singular if the original contract being invalid and incapable to be enforced, a collateral contract founded upon it could be enforced."¹

"Where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties know the law or not. But in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and if this be so, the knowledge of what the law is becomes of great importance. The *mens rea* is as necessary to avoid a contract which can be legally performed, as it is to render the parties criminally responsible for a conspiracy to violate the law, since it is indispensable in both cases to show that their object was to satisfy an illegal purpose."²

Illegality as to part of an entire voyage discharges the underwriter as to all.

If the voyage be one and entire, under charter-party or otherwise, any illegality at the commencement or in the course of it makes the whole illegal; so that the assured cannot recover on a policy effected to protect any part of it, although there may have been no illegality in the part of

¹ Redmond v. Smith, 7 M. & Gr. 457, 474.

² Per Cur. in Waugh v. Morris, L. R. 8 Q. B. 202, 208.

the voyage so insured.¹ Thus, if a ship be chartered for one entire voyage "from London to Madeira, and thence to the East Indies," and a policy be effected on ship "from Madeira to the East Indies only," then, if the ship have been engaged in smuggling, or any other illegal act, between London and Madeira, this will prevent the assured from recovering on the policy "from Madeira to the East Indies," although there may have been no illegality in this latter stage of the voyage.

Whether, in case a ship were chartered for a voyage out and home, as from A. to B., and back again to A., and two separate policies were effected, one on the outward and another on the homeward passage, if there should be no illegality on the outward passage, the policy thereon would be vitiated by a subsequent illegality on the homeward passage, would probably depend on circumstances, especially on this, whether the illegality committed were intended at the commencement of the adventure, so that every step thence forward must be regarded as a step taken in the prosecution of the intended illegality.²

The illegality must be on the voyage insured.

But if the illegality never were committed, though contemplated, having been prevented, *e. g.*, by the loss of the ship on the first stage of the voyage, especially if the circumstances admitted of a *locus pœnitentiæ* as to the committing of the illegality, it has been held that such contemplated, or rather contingent, illegality on the homeward passage could not vitiate the policy on the outward passage.³

Sewell v. Royal Exchange Assurance Co.

Of course, if the voyage of the ship be not one and entire, but there be several distinct voyages, and only one of these is insured in the policy on which the action is brought, an illegality on any other of such voyages cannot possibly affect the claims of the assured. The only question is, whether

¹ Admitted by Lord Kenyon in *Wilson v. Marryatt*, 8 T. R. 31, 46, and expressly ruled by him at N. P. in *Bird v. Figon*, 2 Selw. N. P. 1000.

² See *Sewell v. Royal Exch. Ass.*

Co., 4 Taunt. 855, 858, 864.

³ *Ibid.* See *Waugh v. Morris*, L. R. 8 Q. B. 202, the action, however, there being on a charter-party.

there was any illegality in the course of the very voyage insured in the policy.

Bird v. Appleton.

Thus, where it appeared that an American ship had sailed from London to Canton, and thence back to Europe, but it was distinctly found that the voyage from London to Canton and that from Canton to Europe were two distinct voyages, it was held that an illegality committed in the course of the ship's voyage between London and Canton could not possibly affect a policy on the voyage from Canton to Europe.¹

In case of a policy "at and from," an illegality at the port vitiates the policy.

In case of a policy on ship "at and from," if there be any illegality in the risk while the ship is at the place, that vitiates the policy on the entire voyage insured, though the illegality may cease before the ship sails.

Thus, where a policy was effected on an American ship "at and from Canton to Hamburg," and it appeared that the ship, on arriving at Canton, and for a short time while she lay in harbour there (consequently after the inception of the risk on ship under this policy) had on board an illegal cargo, which she had taken in at Bombay for sale at Canton, in the course of a separate and distinct voyage: this was held to vitiate the policy on the ship, though she disposed of all her illegal cargo at Canton, and sailed thence for Hamburg with another cargo, in itself quite unobjectionable.² The principle is, that "an illegal cargo on board but for an hour after a policy attaches will avoid that policy and discharge the underwriters from all subsequent liability."³

Policy on cargo purchased with the proceeds of an illegal cargo.

In the same case a policy was effected for the same voyage, "at and from Canton to Hamburg," *on goods* which were purchased at Canton for the homeward voyage partly with the proceeds of the illegal cargo, and none of which were, consequently, shipped on board till the whole of the illegal cargo was unloaded: this policy the Court held to be good, the risk on the goods under it not attaching till all illegality was at an end by the prior discharge of the illegal cargo, with

¹ *Bird v. Appleton*, 8 T. R. 562.

² 1 Marshall, Ins. 68.

³ *Ibid.*

the proceeds of which they were purchased. "In such a case as the present," says Lawrence, J., "if the money were obtained by robbery on the highway, and afterwards laid out in the purchase of a cargo, I do not know why that cargo may not be insured."¹

The positions, therefore, derivable from the cases appear to be: 1. That any illegality in the prior stages or at the outset of an integral voyage vitiates a policy, though effected only to protect some later stage of it on which there is no illegality. 2. That an illegality in any part of an entire risk, or voyage insured, vitiates the insurance as to the whole of it. 3. That the illegality of a wholly distinct and separate voyage or venture can have no effect on the voyage or venture described in the policy.

Result of the cases.

Where the policy is thus avoided in consequence of the illegality of the risk, the underwriter is entirely discharged from all liability, although he himself was aware of the illegal nature of the adventure.² Nor is the assured, even though a foreigner, entitled to any return of premium,³ except under very special circumstances, from which the Court may fairly infer that at the time of making the policy he was not, nor, in fact, could have been aware of the real nature of the transaction.⁴ But the circumstances must be very special indeed to induce the Court to depart from the general rule based on the broad and intelligible principle, that where the contract is founded on a consideration clearly illegal, neither party shall be allowed a *locus standi* so as to receive any assistance in a Court of Justice.⁵

Right to the premium.

¹ Bird v. Appleton, 8 T. R. 562.

² Bynkershoek, Quæst. Juris Public. lib. i. c. 21. Roccus (No. 21) mistakenly advanced the opposite doctrine. See Lord Mansfield's judgment in Holman v. Johnson, 1 Cowp. 341, 343.

³ Vandeyck v. Hewitt, 1 East, 96; Lubbock v. Potts, 7 East, 449;

Palyart v. Leckie, 6 M. & Sel. 290; see post, Pt. III. Chap. IX. *Return of Premium*.

⁴ Oom v. Bruce, 12 East, 225; Hentig v. Staniforth, 5 M. & Sel. 122; see post, Pt. III. Chap. IX. *Return of Premium*.

⁵ Per Lord Ellenborough in Palyart v. Leckie, 6 M. & Sel. 293.

In further application of this principle the Courts have also determined that, where the premiums have not been paid, the underwriter cannot sue the broker for them in case the policy, in respect of which they are claimed, is in its language large enough to comprise an illegal adventure, and was intended by the assured to be applied thereto.¹

In the case last cited, in reference to a point that had been made in the argument, viz., that, consistently with the words of the policy, the adventure might have been legal, and the underwriter had no means of knowing that it was not: Lord Ellenborough said, "The policies being large enough to cover an illegal adventure, and an illegal adventure being, in fact, intended to be covered by them, if the plaintiff (the underwriter) really meant to protect that adventure, his subscription was illegal, and consequently his present demand, being grounded on an illegal consideration, cannot be sustained. If he did not mean to protect that adventure, but supposed that some other lawful adventure was intended by the assured, then, admitting the subscription to have been an innocent act on his part, there will be no consideration at all to support his present demand."²

Principles on which these decisions depend.

The principles on which the foregoing decisions depend are,—1. That no Court of Justice can interpose to assist either of the parties to an illegal contract; 2. That *in pari delicto potior est conditio possidentis*.

Under the municipal law

The revenue laws.

Smuggling.

The most extensive branch of illegal traffic is that which is prohibited by the revenue laws of the state; in other words, the smuggling trade.

It is a settled and universal principle, that an insurance on property to be employed in trading contrary to the revenue laws of the state where the contract is made or

¹ *Jenkins v. Power*, 6 M. & Sel. 283.

² Per Lord Ellenborough, in *Jenkins v. Power*, 6 M. & Sel. 289.

sought to be enforced, is void. No Court, consistently with its duty, can lend its aid to carry into execution a contract which involves a violation of the laws which that Court is bound to administer.¹ All insurances, therefore, made or sought to be enforced in this country on goods, the exportation or importation of which is prohibited by the revenue laws of the United Kingdom, are void on the principle just laid down.²

It is not involved in this principle that the same respect should be observed in our Courts for the revenue laws of other countries. A declaration to this effect long ago by Lord Mansfield has never since been doubted to be the clear rule of English law, and, therefore, no insurances can be void merely because effected on property embarked in enterprises which those laws would prohibit.³ This decision

But this country pays no attention to revenue laws of foreign states.

¹ 1 Emerigon, c. viii. s. 5, p. 215 ; 3 Kent, Com. 262.

² Customs Laws Consolidation Act, 1876 (39 & 40 Vict. c. 36).

³ *Lever v. Fletcher*, Park on Ins. 507 ; 1 Marshall, Ins. 56 ; *Planché v. Fletcher*, 1 Dougl. 251.

It is an error of long standing (see 1 Marshall, Ins. 56, and 1 Park, Ins. 507), which Mr. Arnould had also adopted, 2nd ed. vol. 1, p. 743, to represent the decision in *Lever v. Fletcher* as sustaining a contract of insurance "in a trade carried on not only in fraud of the revenue laws of a foreign state, but also against the express conditions of a treaty to which Great Britain and the foreign state were parties." I have referred to the Treaty of Paris of 1763, in Marten's *Recueil des Traités*. There are no such conditions, as are here intended, in it. But what is to be found there, after cessions of territory to Great Britain, is a clear demarcation of the American territory still to continue Spanish, and consequently a defined limit within

which Spanish municipal law was to remain in full force. This is the full effect of Lord Mansfield's reference to the Treaty of Paris. He then very naturally, according to the true state of the case when the treaty is looked at (but very illogically and incoherently according to the error which I am pointing out), passes to the mention of Spanish municipal law, by which the trade of the ship in question was illicit. Read the passage in this view, and see how naturally it falls in with it, and also how the other reduces it to incoherent nonsense. "Every trading with the subjects of Spain is illicit by the Treaty of Paris. The navigation [i. e. of the Mississippi] is free to both countries, and the municipal laws of both countries [Great Britain and Spain] remain [i. e. within their respective territories, defined by the treaty already mentioned]. Though such trading be contrary to the laws of Spain, yet no country pays attention to the revenue laws of another. Therefore, if the defendant had with

covers, of course, all ordinary means for carrying out such adventures, fictitious papers included.

The legislature itself appears to have sanctioned the same principle, by permitting the practice of insuring "without further proof of interest than the policy," to continue in force for the purpose of facilitating the smuggling trade in bullion with the colonies of Spain and Portugal; and this by a clause of the very Act which abolished the practice for almost all other purposes, as impolitic and immoral.¹

Grave questions have been raised by many able writers as to the morality and justice of this rule of law. In France, Valin,² Emerigon,³ and Pardessus,⁴ admit such insurances to be valid, but ground their validity chiefly on the concurrent usage of all commercial nations; Pothier, on abstract principles of morality, vehemently condemns the practice,⁵ and his views have been ably supported by Mr. Marshall in this country,⁶ and, on the other side of the Atlantic, by Chancellor Kent⁷ and Story, J.⁸ The reasonings adduced by these eminent persons against the rule as established in this country by Lord Mansfield, and universally acted on in practice, do not appear to Mr. Arnould to be convincing.⁹

The under-
writer must be
informed of
the risk.

The ship or the goods thus engaged in the foreign smuggling trade are, of course, liable to seizure and confiscation by the foreign government. As this liability materially increases the risk, the nature of the adventure ought, on the plainest principles of equity, to be disclosed to the underwriter at the time of effecting the insurance. Hence the

full knowledge that it was a smuggling trade with Spain made the insurance, then it might be a fair contract between the parties." *And so on.*

¹ The clause is the third section of the 19 Geo. 2, c. 37, the Act against wagering policies.

² Valin, *Comment on Ordonnance de la Marine*, tit. vi. art. 49, p. 127.

³ 1 Emerigon, c. viii. s. 5. p. 216.

⁴ 3 Pardessus, *Droit Com.* art. 772.

⁵ *Traité d'Assurance*, No. 58.

⁶ 1 Marshall on *Ins.* 55.

⁷ 3 Kent's *Com.* 263, 265.

⁸ Story, *Conflict of Laws*, no. 256, and on *Agency*, no. 195 *et seq.*

⁹ See Lampredi, *Del Commercio dei Neutrali*, part i. s. 1, cited in Azuni, *Diritto Marittimo dell' Europa*, part ii. c. 2, art. i. vol. ii. pp. 47—50. See also Emerigon, *quod sup.*, and Pardessus, *Droit Com. quod sup.*, and also tom. vi. no. 1492.

rule is well established, that the assured cannot recover on policies effected for the purpose of protecting a trade prohibited by foreign revenue laws, unless the underwriter were fully informed of the nature of the intended risk.¹

Pardessus is of opinion that the contract of insurance, although made in the country whose revenue laws are violated by the traffic it is intended to cover, can nevertheless be enforced in the country of the assured.² The supposition of the learned commentator seems necessarily to involve this in it, that the insurer is also of the country of the assured; at all events, if the insurer is at least not of the country whose laws are to be violated, the contract, although made there, is made with a view to performance under the laws of a foreign country, and consequently by these is a valid contract.

Effect of
Lex loci con-
tractus.

As all traffic and all voyages carried on in contravention of the Acts passed for regulating the trade and navigation of the United Empire are illegal, it follows, on the same principles, that all insurances intended for the protection of such risks are void. Of these statutes the most celebrated were the Navigation Laws, now repealed. The principal Act in force for regulating the navigation of the United Kingdom is the "Merchant Shipping Act of 1854" (17 & 18 Vict. c. 104); in addition to which is to be mentioned the "Merchant Shipping Act Amendment Act of 1855" (18 & 19 Vict. c. 91); the "Merchant Shipping Act Amendment Acts of 1862" (25 & 26 Vict. c. 63); of 1867 (30 & 31 Vict. c. 124); of 1871 (34 & 35 Vict. c. 110); of 1872 (35 & 36 Vict. c. 73); of 1873 (36 & 37 Vict. c. 85); of 1876 (39 & 40 Vict. c. 80); the "Passengers Act of 1855" (18 & 19 Vict. c. 119); the "Passengers Act Amendment Acts of 1863" (26 & 27 Vict. c. 51); of 1870 (33 & 34 Vict. c. 95); the

Trade and
navigation
laws.

¹ Emerigon, in the opinion with which he favoured Valin upon this question, and which is inserted under art. 49, *quæd sup.*, gives the authorities by which this rule is established.

² 6 Pardessus, Droit Com. no. 1492.

"Merchant Shipping Repeal Act of 1854" (17 & 18 Vict. c. 120); the "Customs Laws Consolidation Act of 1876" (39 & 40 Vict. c. 36); the Act still in force, except as to sect. 4, for "admitting Foreign Ships to the Coasting Trade" (17 & 18 Vict. c. 5), and the Act, especially saved out of the operation of the "Merchant Shipping Act," by its 108th section, for "regulating the trade of ships built and trading within the limits of the East India Company's Charter" (3 & 4 Vict. c. 56); the "Kidnapping Act, 1872" (35 & 36 Vict. c. 19).

In case the assured is not a party to the illegality committed by his vessel, or conniving at the offence, the policy upon the ship is not thereby rendered invalid, and even if the consequence of the illegality be by express enactment, *e.g.*, by sections 9, 16, and 18 of the Kidnapping Act (35 & 36 Vict. c. 19), the condemnation of the ship, the innocent assured might still be entitled to recover on the policy as for a loss by barratry.¹

From the principle involved in the decisions on policies affected by the provisions of the Customs Acts, it seems reasonable to infer that, in case a British vessel were, with the connivance of the assured, to sail without the certificated master, mate, or engineer, or licensed pilot, required by the Merchant Shipping Acts of 1854 and 1862, the policy would be vitiated.² This would apply to the assured on goods equally as to the assured on ship, if he were a party to the illegality.³

Accordingly, it was held that the want, of which the owner had knowledge, of a certificate of previous service by the master of a slaver, in accordance with the provisions of

¹ See cases in next note, and *Australasian Ins. Co. v. Jackson*, 33 L. T., N. S. 286, *coram* Privy Council. See 1 Duer, 360, as quoted by Quain, J., in *Dudgeon v. Pembroke*, L. R. 9 Q. B. 581, 585.

² 17 & 18 Vict. c. 104, ss. 131—140; 25 & 26 Vict. c. 63, ss. 5—12; and see 18 & 19 Vict. c. 119, ss. 11, 12, 19, &c.; *Cunard v. Hyde*, E. Bl.

& E. 670; *Cunard v. Hyde*, 2 E. & E. 1; *Rankin v. Wilson*, 34 L. J. (Q. B.) 62; *Farmer v. Legg*, 7 T. R. 186; *Carstairs v. Allnutt*, 3 Camp. 497; *Metcalfe v. Parry*, 4 Camp. 125; *Dudgeon v. Pembroke*, L. R. 9 Q. B. 581.

³ See *Carruthers v. Gray*, 3 Camp. 142; *Hobbs v. Henning*, 34 L. J. (C. P.) 117—122.

the 31 Geo. 3, c. 54, s. 7, passed for the regulation of the slave trade, and inflicting heavy penalties in case of non-compliance, had vitiated the policy on ship.¹ On the same ground a voyage was held to be illegal, because the master had omitted in the manifest some part of the cargo, though only used for dunnage and ballast, contrary to the provisions of 26 Geo. 3, c. 40, s. 1, which imposed heavy penalties if the cargo did not agree with the manifest.²

Beside the statutes as to trade and navigation already referred to, our commercial intercourse with different countries is mainly regulated by commercial treaties, which have at different times been entered into between our own country and the principal maritime states of Europe and America.

International
commercial
treaties.

"Every treaty," says Lord Stowell, "is part of the private law of each of the countries which are parties to it, and is as binding on the subjects of each as any part of their own municipal laws."³ Consequently, all insurances on ships or goods navigated or conveyed contrary to the provisions of any commercial treaty to which our country is party are inoperative and void, on the same principle as those effected on trading adventures which contravene the positive prohibitions of our own statutes.⁴

It is because the above Acts and treaty regulations form part of the general commercial policy of the empire that a violation of their provisions renders illegal any traffic or voyage, and avoids any insurances that are in contravention of their terms. The same consequences do not necessarily follow the violation of Acts of Parliament, which, though connected with the trade and navigation of the country, are yet passed for a collateral purpose. Thus, the want of a written agreement with the crew in the form and of the contents required by the Merchant Seamen's Act (5 & 6

Enactments
with a col-
lateral pur-
pose do not
operate the
same effect.

¹ *Farmer v. Legg*, 7 T. R. 186.

Rob. Adm. Rep. 1, 6.

² *Freard v. Dawson*, 1 Marshall, Ins. 171.

⁴ See *Wilson v. Marryatt*, 8 T. R. 31; *S. C.*, 1 B. & P. 430; and *Bird v.*

³ In the case of *The Eenrom*, 2 C.

Appleton, 8 T. R. 562.

Will. 4, c. 19), was held not to render a voyage illegal, and, consequently, an insurance thereon void,¹ nor the ship unseaworthy.²

Occasional
statutes.

- During the great maritime wars arising out of the French Revolution, our government passed two Acts, one in 1797,³ and a second, re-enacting the former, on the renewal of the war in 1802,⁴ requiring all ships, not expressly excepted in the Act, to sail with convoy; it having been found that, owing to their neglect to do so, our trade and shipping had suffered to a very considerable extent. These Acts, intended only to continue in force during the hostilities then existing, expired, the first on the ratification of the Peace of Amiens, and the second on the termination of the war in 1814.

An insurance on any subject for an adventure, contravening the terms of occasional Acts of Parliament, is void, although the Act contain no clause specially avoiding it.

Johnson v.
Sutton.

Thus, where during the first American war an Act was passed, expressly prohibiting all trading with the province of New York except in provisions for the use of the British forces, and even then, only provided a licence were produced authorizing their export; an insurance effected on unlicensed goods on board a British ship intended for the New York market, was held illegal and void under this statute, although the commander of the forces had by proclamation (unauthorized, however, by the statute) allowed the entry into New York of such unlicensed goods.⁵

Parkin v.
Dick.

Where, during the French wars, an Act was passed, empowering his Majesty to prohibit the exportation of all naval stores without a licence, and an Order of Council was accordingly made, in which such exportation was prohibited under penalty of forfeiting the goods themselves and treble the value; it was held that a policy effected "on goods to be

¹ Redmond v. Smith, 7 Man. & Gr. 457.

² Per Tindal, C. J., 7 Man. & Gr. 474, 475.

³ 38 Geo. 3, c. 76.

⁴ 43 Geo. 3, c. 57.

⁵ Johnson v. Sutton, 1 Dougl. 254. The Act was 16 Geo. 3, c. 5 (1775).

thereafter specified" for an outward voyage, was rendered wholly void by the assured including in the specification afterwards made up by him, some goods, the exportation of which was prohibited by this Order in Council, he having obtained no licence to authorize their exportation.¹

Lord Ellenborough in this case declared that, although the prohibited goods formed an exceedingly small portion of the whole venture, yet, as the whole was sought to be covered by one entire contract of insurance, such contract was entirely vitiated: "I have no scales," said his Lordship, "to weigh degrees of illegality."²

So where part of the cargo was legal, but the residue, though legal, was intended to cover an illegal design, and the whole was insured in one policy, his judgment was to the same effect.³

Gordon v. Vaughan.

In these cases no licence at all had been procured for the exportation of the prohibited goods, and all were insured under one policy. Where, however, such licence had been obtained by the assured, the policy of insurance was held valid, notwithstanding prohibited goods of other persons were put on board the same ship but not covered by the policy,⁴ and only invalid to the extent that he himself had exceeded the licence by shipping a surplus of prohibited goods.⁵

Secus, if a licence be obtained.

In a later case, before Lord Tenterden in the Queen's Bench, an informality in performing the condition on which the licence for exporting gunpowder had been granted, was held to vitiate the entire insurance on a general cargo, all belonging to the same owner, and of which the gunpowder exported under such licence formed part.⁶ The ground of this decision was, that the informality in question rendered

Camelo v. Britten.

¹ *Parkin v. Dick*, 2 Camp. 24; *S.C.*, 11 East, 502. *Contrast Hagedorn v. Bazett*, 2 M. & Sel. 100, post, p. 702.

² 2 Camp. 222.

³ *Gordon v. Vaughan*, 12 East, 302, note.

⁴ *Pieschell v. Allnutt*, 4 Taunt.

792.

⁵ *Keir v. Andrade*, 6 Taunt. 498; 2 Marshall's Rep. 196; *Butler v. Allnutt*, 1 Stark. 223.

⁶ *Camelo v. Britten*, 4 B. & Ald. 184.

the licence wholly void, so that the case stood on the same ground as though no licence at all had been procured, and therefore fell within the general principle established in the case of *Parkin v. Dick*.

*Gibson v.
Service.*

The following case shows the extent to which this principle has been carried by the English Courts. A British ship had been permitted to take out a cargo of arms and gunpowder, on giving a bond, as required by law,¹ that the same should be expended in trade on the coast of Africa, where she was bound. An American ship, in pursuance of a previous agreement, made before she sailed, met her in the river Congo, in order to take the arms and gunpowder out of her there, and carry them to America. In order to protect this enterprise, an insurance was effected on the American ship, "at and from the river Congo to Charleston:" it was held, that this insurance was illegal and void, on the ground that the American ship was at the river Congo, in order to violate the laws of the country where the contract of insurance was made, and sought to be enforced.²

Where voyage
legal in fact,
not in terms.
*Atkinson v.
Abbott.*

In the following case a voyage was held legal, because justified by its object, though contravening the strict terms of an Order in Council. Under a policy on goods "from London to Helmsberg (a Swedish port), the Sound, and Copenhagen, all or either," the ship sailed under false clearances for the Swedish port, but with a real destination for Copenhagen, all intercourse with which place was strictly prohibited by certain Orders in Council then in force; as, however, it was proved, to the satisfaction of the jury, that the real object of the venture was to carry provisions to the British armament, then supposed to be at Copenhagen, and not to defeat the Order in Council by trading with the enemy, the Court held that the voyage was not illegal; and that, although the taking out a clearance for a place to which it was not intended to go, subjected the party to a

¹ 33 Geo. 3, c. 2, s. 4.

¹ Marshall's Rep. 119; *S. C.*, *Gibson*

² *Gibson v. Service*, 5 Taunt. 433; *v. Mair*, *ibid.* 39.

penalty, under the stat. 13 & 14 Car. 2, c. 11, s. 3, there was nothing in the Act, on the principle mentioned, to make the voyage illegal.¹

The sovereign power of every government has in time of war a clear right to establish, by proclamation or otherwise, an embargo on all ships in any port of its dominions; all insurances, therefore, effected on any ships, whether the property of foreigners or subjects, which sail in contravention of such embargo, are illegal and void. Thus, where the British Government in time of war had laid an embargo on all ships sailing with provisions from any port in Ireland, an insurance effected on a neutral (Venetian) ship, in contravention of such embargo, was on this ground held void.²

In contraven-
tion of em-
bargo.

It is generally laid down by writers on the laws of war that the object of every belligerent state in time of war is to inflict on the enemy all the mischief, and deprive him of all the advantage, which the law of nations will permit.

Illegal as
against our
war policy.

One of the main sources of wealth and strength to every mercantile state being its maritime commerce, the law of nations has hitherto permitted to each belligerent the endeavour, by every effort, to impede and annihilate such commerce, by destroying or making prize of the enemy's ships and merchandise; and, upon the same principles, the municipal or common law of every state has declared insurances by its own subjects upon such ships or merchandise to be void.

Insurances on
enemy's pro-
perty void.

We have elsewhere had occasion to advert to the course of decisions by which our Courts established that insurances on behalf of alien enemies were wholly illegal and void.³ We have seen it progressively decided that alien enemies could not sue on such contracts in our Courts, either by themselves

¹ *Atkinson v. Abbott*, 1 Camp. 535; *Ins.* 505.

S. C., 11 East, 135.

³ *Ante*, p. 131.

² *Delmada v. Motteux*, 1 Park,

or their agents;¹ that such insurances were in themselves illegal, and, therefore, that although effected before the breaking out of hostilities, yet they could not protect an enemy against the consequences of British capture after war had broken out;² that no action, consequently, could be maintained upon them, even after the restoration of peace, in respect of any loss that had taken place during hostilities;³ although, supposing both the policy to have been effected and the loss to have accrued before the commencement of hostilities, the right of the alien enemy to sue upon such policy was only suspended during the continuance of war, and would revive upon its close.⁴

An agent shipped goods to several principals, none of them jointly interested with another of them, one of them, however, being an enemy, and the agent covered the whole with one insurance, the policy was held good for all except the enemy, and as to his interest invalid.⁵

Insurances on
trade with the
enemy void.
Potts v. Bell.

In the decisions just referred to, the insurance was generally effected on behalf of enemies, to protect their property during war from liability to British capture or other casualties. In those that we are now about to consider, the design was to protect the interests of British subjects, during war, in trade carried on with the enemy without the King's licence. The question, therefore, involved in them was, whether trading with the enemy during war, without licence, was illegal in British subjects.

The question came before the Courts of common law in the case of an insurance effected for a British subject in time of war, to protect his interest in goods purchased of an enemy by his agent in the enemy's country, and shipped thence for

¹ *Brandon v. Nesbitt*, 6 T. Rep. 23; 407.
Bristow v. Towers, *ibid.* 35.

² *Furtado v. Rogers*, 3 B. & P. 191.

³ *Furtado v. Rogers*, 3 B. & P. 191; *Brandon v. Curling*, 4 East, 410; *Gamba v. Le Mesurier*, *ibid.*

⁴ *Flindt v. Waters*, 15 East, 260, 266; *Harman v. Kingston*, 3 Camp. 150, 152; *Boulton v. Dobree*, 2 Camp. 162.

⁵ *Hagedorn v. Bazett*, 2 M. & Sel. 100.

England without a licence. The Court of Common Pleas decided that this insurance was legal;¹ but the Court of King's Bench, after two arguments, first by common lawyers, and afterwards by civilians, on mature deliberation, unanimously held that such insurance was wholly illegal and void.²

This case, and that of *The Hoop*, decided by Lord Stowell in the Admiralty Court shortly before it, have established the rule that all trading by the subjects of this country with the enemy of England is wholly illegal, and all insurance to protect such trading absolutely void.

A British subject, however, domiciled in a foreign country, becomes, we have seen,³ for all commercial purposes, the subject of the foreign state, and he may, if it be a neutral state, legally trade even with the enemies of this country, and protect such trading by a policy effected here.⁴ For him, a policy on trading carried on in a way which would be illegal for a British subject, but is legalized by treaty for the subjects of the neutral country in which he is domiciled, is valid.⁵

Except in
virtue of neu-
tral domicil.
Bell v. Reid.

*Wilson v.
Marryatt.*

We have seen elsewhere⁶ that if a neutral or a British subject continue in time of war to keep up a trading establishment in a hostile state, all his property connected with such hostile firm is liable to British seizure as enemy's property.⁷ There seems no doubt that all insurances effected here in time of war by a British subject to protect such property, would be held wholly illegal and void.

Illegality is never presumed in respect of any instrument

¹ *Bell v. Gilson*, 1 B. & P. 345.

² *Potts v. Bell*, 8 T. R. 548.

³ Ante, pp. 141, 143.

⁴ *The Danaons*, cited in 4 C. Rob. Ad. R. 255; *Bell v. Reid*, and *Bell v. Buller*, 1 M. & Sel. 726.

⁵ *Wilson v. Marryatt*, 8 T. R. 31.
This does not apply to those subjects

who migrate into the neutral country,
flagrante bello; *The Dos Hermanos*,
2 Wheat. S. C. Rep. 76.

⁶ Ante, p. 145.

⁷ *The Vigilantia*, 1 C. Rob. Ad. R. 1; *The Portland*, 3 C. Rob. Ad. R. 41.

Illegality is never presumed.

if it admits of being read in a way consonant with a legal object. Thus a policy "to any port or ports in the Baltic" was *prima facie* legal, if all the ports on that sea were not hostile, until it was proved that the ship, when captured, was bound for a hostile port without a licence.¹ And this too would be the construction of a policy containing a liberty in similar terms to touch at any port or ports in a particular sea, in which there were both hostile and neutral ports.²

Immediate and not ultimate destination rules.

An insurance on goods to a friendly or neutral port, there to be delivered to a neutral, is valid, though the neutral himself be resident in a port of hostile occupation.³

What is a hostile port.

During the unexampled circumstances of the great war, when Napoleon, by the Berlin and Milan decrees, endeavoured to exclude English commerce from all the ports of the Continent, our Courts were frequently called upon to decide as to the hostile or non-hostile character of ports which were occupied by the arms, or coerced by the power, of the conqueror, who aspired, and almost attained, to the complete subjection of Europe. The principle, accordingly, on which our Courts acted with respect to such ports, was to treat them as neutral, and, consequently, all trading to them as legal, in all cases where they still preserved the forms of an independent neutral government, though the enemy might have such a body of troops stationed there as effectively to exercise the real powers of sovereignty.⁴

Donaldson v. Thompson.

Thus, although there was an overwhelming force of Russians in the island of Corfu, yet as the flag of the Ionian

¹ Wright v. Welbie, 1 Chitt. 49; S. P. Anon. ibid. See also, as to insurance to any port or ports in the island of St. Domingo, when partly in possession of the French, partly of King Christophe, Johnson v. Greaves, 2 Taunt. 344; Blackburn v. Thompson, 3 Camp. 61.

² Per Lord Ellenborough, Muller

v. Thompson, 2 Camp. 610.

³ Bromley v. Hesselstine, 1 Camp. 75. Compare Hobbs v. Henning, 34 L. J. (C. P.) 117; and Waugh v. Morris, L. R. 8 Q. B. 202.

⁴ See the elaborate judgment of Lord Ellenborough in Hagedorn v. Ball, 1 M. & Sel. 459, 460.

republic was still hoisted at its ports, and the republican government continued to appoint a port-admiral and receive consuls from foreign states, Lord Ellenborough held that Corfu was neutral.¹

So, in 1811, when our commerce was totally excluded from Prussia, under the Berlin decree, and no diplomatic intercourse subsisted between the two states, Lord Ellenborough held that, in the absence of open hostility between them, Prussia was not to be considered as at war with this country, and therefore, that an insurance effected on the property of a British subject shipped hence for a Prussian port, was not illegal.²

During a period that Hamburg was in the military occupation of Davoust with an overwhelming French force, but while the senate of Hamburg still continued in the full exercise of sovereign civil authority, an insurance was effected in this country on goods, the property of certain persons domiciled at Hamburg, and shipped from London for a Baltic risk, under a licence to cover British and neutral trade. The question was, whether the parties interested, being domiciled at Hamburg, were neutrals, so as to protect the trading under this licence, and give validity to the insurance effected on it. Lord Ellenborough and the Court of King's Bench held that they were; for Hamburg having still the forms of her own government must be regarded as a neutral port, though under hostile occupation, and had not been declared otherwise by any Orders in Council subsisting when the risk attached under the policy.³

It is for the government of the country to determine in what relation any other country stands towards it. Whenever our government, in the course of the great war, by Order in Council, proclamation, or other act of supreme authority declared any ports in the colonial or other possessions of the

Muller v. Thompson.

Hagedorn v. Bell.

The courts are ruled by the government.

Johnson v. Greaves.

¹ *Donaldson v. Thompson*, 1 Camp. 610.
429.

² *Muller v. Thompson*, 2 Camp. 450.

³ *Hagedorn v. Bell*, 1 M. & Sel.

enemy not to be hostile, or when such order, &c., though issued for another purpose, contained a recognition that there were such non-hostile ports, a trading with such ports, though not directly sanctioned or permitted by the order, was held legal without a licence, and insurances to protect such trading were upheld as valid. This principle was illustrated by decisions of the Courts with regard to those ports in the island of St. Domingo in possession of King Christophe, then in a state of rebellion against our enemies the French: and it was held on more than one occasion, that trading between this country and such ports was valid without any licence.¹

That govern-
ment may
licence.

The executive power of the state, being the sole and supreme arbiter of all questions relating to peace and war, may grant to such of its subjects as it pleases any privilege or licence to trade with the enemy, or to hostile ports, on any terms and for any period that may appear expedient.

Illegal under
the law of
nations.

A neutral power is one which, on the breaking out of war between any two or more powers, continues to be at peace and wholly abstains from taking any part in the hostilities of the belligerents.²

Neutrality.

Such is the definition generally given of neutrality by the writers upon international law. The state of neutrality, in their view of it, rather imports the duty which a neutral power owes to the belligerents, than the relative situation in which either of the belligerents may choose to regard the neutral power. But it is not to be forgotten that it belongs to every power to pronounce upon the continuance either of amity, hostility, or neutrality as between itself and any other power; and consequently there is no doubt that either belligerent may continue for his own purposes to treat any power as neutral long after such power had ceased to observe

¹ Johnson v. Greaves, 2 Taunt. 344; Blackburn v. Thompson, 3 Camp. 61; see also the case of Atkinson v. Abbott, 11 East, 135.
² 2 Azuni, Diritto Maritimo dell' Europa, 11—18.

towards him strictly neutral conduct. Nations are not bound to take up every cause of just offence, nor are they of necessity to be considered as hostile to each other, if there be a sort of condonation on the one side, for the purpose of continuing commerce with the other which has given just cause of offence. The term neutrality, in a more enlarged sense, may be extended to signify this kind of permitted relation between any two states, after the right to its continuance has been forfeited by one of them.¹

The following are some of the more important responsibilities attaching to neutrality which have the effect of exposing to confiscation for default, with the further consequence that insurances to protect adventures in violation thereof are void absolutely in the hostile country, and only valid in a neutral country when made with notice of the nature of the risk.²

1. Neutrals must not, during the continuance of hostilities, furnish either belligerent with warlike stores and other articles which are directly ancillary to warlike purposes, and which are generally denominated contraband of war. Duties of neutrals.

2. Neutrals must not engage in voyages or carry on traffic in violation of blockades established and maintained with an adequate force by a belligerent.

3. Neutrals must not, in time of war, engage in the privileged colonial or coasting trade of the enemy, which in time of peace was not open to them, but confined to the subjects of the enemy state solely.

4. Neutral ships are in time of war liable to, and should not resist, being searched by belligerent vessels, seeing it is done for the purpose of ascertaining their national character and their observance of neutral conduct.

5. Enemy's goods are not protected from seizure by being

¹ See the judgment of Lord Ellenborough in *Hagedorn v. Bell*, 1 M. & Sel. 459.

Chavasse, in *re Grazebrook*, 34 L. J. (Bkpcy.) 17; per Kent, J., cited 1 Phillips, no. 446.

² See per Lord Westbury, *Ex parte*

carried in neutral ships, but so to carry them is no violation of neutrality, and imposes no forfeiture on the rest of the venture belonging to other owners.

This 5th rule is according to the old-established law of nations; but the treaty of Paris has introduced a different rule among the powers that are adherents of that treaty. "The neutral flag covers enemy's goods, with the exception of contraband of war;" "Neutral goods, except contraband of war, are not liable to capture under enemy's flag."

We will consider briefly the consequences of some of the more important breaches of neutral duty, as far as they bear on the validity of contracts of marine insurance.

Insurances on articles contraband of war.

The first and most important restriction is on the supply to a belligerent by a neutral of articles which are contraband of war. The natural question then is, what articles of commerce are contraband of war?

What articles contraband.

According to the classification of Grotius, articles of commerce with reference to this subject are divisible into three classes:—1. Materials manufactured for the purposes of war, as arms and ammunition.¹ 2. Articles of luxury. 3. Raw materials capable of being turned to the purposes of war, as sail-cloth, timber, pitch, sulphur, money, provisions, ships, hemp, cordage, &c., which being of use both in war and peace are frequently termed articles *incipitis usus*.²

¹ See also 2 Azuni, *Diritto Maritimo*, 181.

² Grotius, *De Jure Belli*, lib. iii. c. l. s. v. § 1.

The Russian proclamation of war against Turkey in 1877 specifies the offences of neutrals in the following terms:—

"VI. The following articles are considered as contraband of war:

"Small arms and artillery, mounted or in detached pieces; ammunition for fire-arms, such as projectiles,

fuses for shells, balls, priming, cartridges, cartridge cases, powder, saltpetre, sulphur, explosive materials and ammunition, such as mines, torpedoes, dynamite, pyroniline, and other fulminating substances; artillery, engineering, and transport materials, such as gun-carriages, caissons, cartridge boxes, campaigning forges, canteens, pontoons, &c., articles of military equipment and attire, such as pouches, cartridge boxes, bags, cuirasses, sappers' tools,

With regard to the two former classes there never has been any doubt; the *instrumenta belli*, which form the first class, have always been held contraband of war; and the articles of mere luxury never. It is with regard to the third class, or articles *ancipitis usus*, that the great uncertainty has prevailed; neutral powers having uniformly contended in regard to these articles for freedom of commerce, while belligerents have insisted on the rigour of war. Attempts to fix a settled list of contraband articles were never so futile as at present, when the system and the means of warfare, especially by sea, are the subject of daily change.¹

The armed neutrality of 1780, and again of 1801, was formed under Russia in order to maintain, amongst other things, that no articles should be deemed contraband of war except those only which were actually wrought up into the form of instruments of offensive or defensive warfare.²

The criterion whereby to determine whether those articles which are *ancipitis usus* be contraband or not, is the object for which they are destined,—whether the ordinary uses of life, or military use? If the former, they are not contraband; if the latter, they are. What used to be thought the best

Articles *ancipitis usus*, contraband or not.

drums, saddles and harness, articles of military dress, tents, &c., and generally everything destined for military or naval forces.

“These articles, when found on board neutral ships, and destined for an enemy’s port, may be seized and confiscated, except the amount necessary for the use of the ship on which the seizure is made.

“VII. The following actions, forbidden to neutrals, will be treated in the same way as the carriage of contraband of war, the transport of enemy’s troops, of despatches and correspondence, and the furnishing of ships of war to the enemy.

“Neutral ships taken while committing such contraband acts may be, according to circumstances, seized

and even confiscated.”

¹ See Azuni, *Diritto Maritimo*, c. ii. art. 5, for the provisions of treaties on this subject anterior to the French Revolution.

² 2 Azuni, *Diritto Maritimo*, 131, 137. The powers that acceded to the armed neutrality of 1780, were Russia, Sweden, Denmark, Prussia, Holland, France, Spain, Portugal, Naples, and the United States. The principles of the armed confederacy were abandoned in 1793 by the naval powers of Europe; in 1801 it was attempted to revive them, but the attempt was immediately repressed by England, and was, in the course of that year, finally abandoned. 1 Kent, Com. 126, 127.

practical test of this question, namely, the character of the port to which they were being sent, has lost much of its worth in this age of railway conveyance. It used to be that if the port were a general commercial one, it was presumed the articles were going for civil use, though occasionally a ship of war might be constructed in that port; but if the great predominating character of the port, like Brest in France, or Portsmouth in England, were that of a port of naval equipment, it was presumed that the articles were going for military use, though possibly they might have been applied to civil consumption.¹

Enumeration
of contraband
articles.²

Ships, naval stores, timber, and all other materials serving directly for the purposes of ship-building, are now generally held to be contraband of war, unless excepted by particular treaties.³

Sail-cloth is held to be universally contraband, even when destined to ports of mere mercantile naval equipment.⁴ Tallow was in the same case held not to be contraband unless destined for a port, such as Brest, of mere hostile equipment.⁵ Cordage is, generally speaking, contraband;

¹ The *Jonge Margaretha*, 1 C. Rob. Ad. R. 189; see also the *Neptunus*, 3 C. Rob. Ad. R. 108.

² This enumeration of articles contraband of war, being the results of judicial decision throughout the course of a long series of great wars, is necessarily retained as a guide by way of analogy to practical and professional men. It cannot be read but with a smile and with an intense feeling of the extraordinary changes through which the nations of Europe have passed during the forty years since this treatise was given to the public. In 1848, the year of its first appearance, the French monarchy fell, and four years after, the Republic was superseded by the Empire. In the war of 1854 Great Britain was still fighting on board her wooden ships of the line under canvas. The

Peace of 1856 was soon followed by the construction of *La Gloire*, the first ironclad; which proved to be the beginning of the greatest revolution in ships and guns and all the means of naval warfare that has happened since the first invention of gunpowder; and we are still [1886] in the first heat and violent progress of these changes.

³ See Rutherford's *Inst.*, lib. i. c. 9. In the commercial treaty between England and the United States, A.D. 1794, an exception is made in favour of unwrought iron and fir planks, all other materials used in ship-building being declared contraband. See also Vattel, liv. iii. c. 7, s. 112.

⁴ The *Neptunus*, 3 C. Rob. Ad. R. 108.

⁵ *Ibid.*

and so are anchors and all other *armamenta navis*.¹ Sulphur and saltpetre, as being main ingredients of gunpowder, have been almost invariably regarded as contraband, and were admitted to be so even by the terms of the armed neutrality.² Tar, pitch, and hemp, were held contraband by our Courts of Admiralty in the last French war.³

Provisions, generally speaking, are not contraband, especially if they are the produce of the country which exports them, unless they are directly sent for the supply of a military force, or in relief of besieged or blockaded places.⁴ In the last war with France, the National Convention, by a law of 9th of May, 1793, decreed that neutral vessels laden with provisions destined to an enemy's port, should be arrested and carried into France; and England, by way of reprisals, on the 8th of June, 1793, ordered a similar detention of all neutral vessels going to France laden with corn, meal, or flour.⁵ The law of nations, in respect to this subject, was declared by Lord Stowell to be, that provisions are not generally contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it.⁶

Contraband articles are said to be of an infectious nature, contaminating whatever of the cargo and of the ship belongs to the same owner, so as to render them liable to seizure and confiscation.⁷ In ordinary cases the only loss sustained by the shipowner, if a mere carrier of contraband articles, is the

Contraband is of an infectious nature.

¹ *Jonge Margaretha*, 1 C. Rob. Ad. R. 189.

² Azuni, del Diritto Maritimo, c. ii. art. 5, vol. ii. pp. 137, 138.

³ *The Maria*, 1 C. Rob. Ad. R. 340, 372.

⁴ 1 Kent, Com. 135, collecting the authorities.

⁵ In the case of the *Jonge Margaretha*, 1 C. Rob. Ad. R. 189.

⁶ 1 Kent, Com. 137. The Courts of the United States have very generally adopted the principles and followed the decisions of Lord Stowell

on questions of prize, contraband, &c.

⁷ *The Stadt Embden*, 1 Rob. Rep. 26; the *Jonge Tobias*, *ibid.* 329. Of course this rule is liable to modification by treaties. Thus, in the commercial treaties of the United States with the new republics of South America, it is stipulated that contraband articles shall not affect the rest of the cargo or the vessel, for it is declared that they shall be left free to the owners; 1 Kent, Com. 143.

loss of freight and expenses; unless there be fraud on the part of the ship for the purpose of protecting the contraband by a false destination and false papers, which will involve the ship also in condemnation.¹

Insurances on contraband void in the belligerent country.

Secus, in the Courts of a neutral state.

Insurances on articles contraband of war are void in the country of the hostile belligerent, and incapable of being enforced in their Courts.²

If the policies were effected by or for neutrals, however, and were sought to be enforced in the Court of a neutral state, the case would be different. Commerce in articles contraband of war is not unlawful to a neutral subject; and seizure and confiscation of these articles during their transit to a hostile port are not unlawful to a belligerent power. These are co-existing rights. The insurance, therefore, by a neutral of articles contraband of war being *per se* a valid contract, may be enforced in the Courts of the neutral country, provided the nature of the trade and of the goods were disclosed to the underwriter, or provided there be just ground from the circumstances of the trade or otherwise, to presume that he was duly informed thereof.³

Contraband implies existing war.

The term, contraband of war, implies the existence of war. A policy, therefore, on arms and ammunition exported from Great Britain to Madeira in the dominions of Portugal in time of peace, was held valid, notwithstanding a clause in our treaty of 1810 with that country excepting commerce in articles contraband of war.⁴

Insurances in violation of blockade.

It is an invariable principle of the law of nations, that if a neutral violates a blockade by carrying supplies to, or in any way trading with, a blockaded port, he is guilty of an offence against the laws of war, and thereby renders his ship

¹ *The Mercurius*, 1 C. Rob. Ad. R. 288, and note; *The Franklin*, 3 id. 217; *The Edward*, 4 id. 68; *The Ranger*, 6 id. 125.

² 1 Marshall, Ins. 75; see Gibson *v. Service*, 5 Taunt. 433; 1 Marshall's Rep. 119.

³ 3 Kent, Com. 267; 1 id. 142; *The Santissima Trinidad*, 7 Wheaton, 283; *Ex parte Chavasse*, In re Grazebrook, 34 L. J. (Bkcy.) 17, *coram*. Lord Westbury, L. C.

⁴ *Wilbraham v. Wartonaby*, 1 Lloyd & Wels. 144.

and cargo liable to confiscation. The consequences of such breach being so highly penal, the law of nations has been very careful to determine of what it consists, and has declared that it can only take place under the three following conditions:—

First, the port must be in an actual state of effective blockade, and such fact must be clearly established to the satisfaction of the Court.

Secondly, the neutral must have had due previous notice of the existence of such blockade.

Thirdly, he must have been guilty of some distinct act of violation, either by coming into or out of the port with a cargo laden after the commencement of the blockade, or by setting out with the intention to do the one or the other after knowledge that the blockade exists.¹

As a blockade is the act of a belligerent, so confiscation for any breach of blockade or attempt thereat is a belligerent right. The lawfulness of commercial intercourse with the blockaded port is not thereby altered for the neutral subject, although he attempts it under a liability to the penalty of confiscation. The voyage is not tainted with illegality, nor any contract connected with it, whether of charter-party or insurance, notwithstanding the distinct object be to run the blockade.² But as an intention to commit a breach of blockade alters the risk, it vitiates the policy unless this intention can be traced to the knowledge of the insurer at the time the policy was made.

It is contrary to the principles of the law of nations as hitherto understood, that a neutral should be allowed to carry on the coasting or colonial trade of the enemy, not open to foreigners during peace, and thereby increase the enemy's resources during war. Accordingly, the rule established by England on the subject is, that the ships and cargo engaged in such trade shall be liable to confiscation

Insurance on neutral ships in the privileged trade of the enemy, void.

¹ See MacLachlan on Shipping, 569 *et seq.*

² See authorities, ante, p. 712, note ³.

as prize of war. This, which is frequently called the rule of 1756, from its having been first settled in that year, was frequently acted upon by Lord Stowell in the course of the wars arising out of the French Revolution.¹

There can be no doubt that an insurance, effected in this country, being at the time a belligerent power, to protect neutral trading of this exceptional character, would be treated as wholly illegal and void by our Courts, on the ground that "trading to an enemy's colony, with all the privileges of an enemy's ship, causes a neutral vessel to be regarded as an enemy's ship, and renders her lawful prize."²

The coasting trade of this country is now thrown open to foreign ships by the 17 & 18 Vict. c. 5.

Neutral and
enemy carry-
trade.

Until the Declaration made with the Treaty of Paris in 1856, it had come to be considered as an established rule of the law of nations, though none has been at times more vehemently contested by those states which, meantime, had an interest the other way, that the neutral flag does not in time of war cover enemy's property from hostile seizure.³

The carrying, however, of enemy's goods from the neutral territory to the enemy's country, was not held to be a breach of neutral conduct, and if there be nothing unfair in the transaction, he was held entitled at the hands of the captors to the full freight due for the carriage of the goods upon the whole voyage, though he had not carried them to their place

¹ See *The Immanuel*, 2 C. Rob. Ad. R. 186.

² *Berens v. Rucker*, 1 W. Bl. 314.

³ *Grotius*, *De Jure Belli ac Pacis*, lib. iii. c. 6, s. 6. *Vattel*, *Droit des Gens*, liv. iii. c. 7, s. 115. One of the most celebrated articles of the code of the armed neutrality of 1780 was, that "all effects belonging to the subjects should be looked upon as free on board neutral ships, except only such as were contraband." *Azuni*, who gives an interesting narrative of

the practice of Europe in this respect, discusses, on abstract principles, the question "whether free ships should make free goods;" and though one of the strongest champions of neutral rights, he decides, on principle, that the former rule of the English Admiralty was the sound one (*Diritto Maritimo*, vol. ii. p. 172). See also the whole subject most ably discussed in *Manning's Commentaries on the Law of Nations*, 203-244.

of destination, because a surrender of them to the captors is a delivery to the person who, by the rights of war, is put in the place of the consignee.¹

Any insurance on such goods themselves could not, of course, be enforced in the Courts of the hostile belligerent, and would be absolutely illegal and void if made by any of his subjects. If made, however, by neutrals, and sought to be enforced in neutral Courts, it would be otherwise; for as the neutral may lawfully carry enemy's property, there can be no doubt that he may lawfully insure it.²

Insurance may be lawfully effected in the belligerent country on the property of neutral owners on board the same ship with enemy's goods bound for an enemy's port. This fact of carrying enemy's goods may subject the ship to be detained and carried into port for investigation; it does not, however, render the adventure illegal, so as to affect the interest of neutral owners, if not covered by the same policy with the enemy's goods.

Hence, where an American ship from New York to Havre was carried into Bristol by British cruisers for examination and found to have a small portion of enemy's property on board, it was held that British underwriters were nevertheless answerable to owners of neutral goods insured on board the same ship, but not by the same policy, in respect of loss incurred on such goods by the breaking up of the voyage consequent on the ship being so brought in for examination.³

Barker v. Blakes.

It is a clear rule of the law of nations, that the effects of neutrals found on board enemy's merchant ships shall be free. This, like the law relating to the goods of enemies, rests on the simple and intelligible principle, that war gives a full right to capture the goods of an enemy, but gives no right to capture the goods of a friend.⁴

Neutral property is free of seizure in enemy's merchant ships.

¹ The Copenhagen, 1 C. Rob. Ad. R. 289; MacLachlan, Shipping, 491 *et seq.*

² 3 Kent, Com. 267.

³ *Barker v. Blakes*, 9 East, 283.

⁴ Grotius, De Jure Belli ac Pacis, lib. iii. c. 6, s. 16; Vattel, liv. iii. c. 7, s. 116.

The captor, in case of neutral goods found on board the enemy's vessel, is entitled to freight upon them if he performs the voyage, and carries the goods to their port of original destination, but not otherwise.¹

Not in armed
ships of the
enemy.

The immunity of neutral goods, however, on board an enemy's ship, is confined to the case of a merchantman, and does not extend to an armed cruiser; for by placing them on board an armed ship of the enemy, the neutral shows an intention to resist visitation and search, and to that extent an adherence to the enemy.²

Declaration of
Paris, 1856.

The 2nd and 3rd Articles of the Paris Declaration of 1856³ are as follows :

2. The neutral flag covers enemy's goods, with the exception of contraband of war.

3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag.

No states are bound by this declaration except those who were parties to it at the time, or who have adopted it subsequently. The states originally parties to it are England, France, Austria, Russia, Prussia, Sardinia, and Turkey. The United States have as yet declined to accede to the rule.

So far it would seem as if an insurance on enemy's goods would not be invalid even in a belligerent country. But yet, as it would contravene the war policy of the belligerent state to protect enemy's goods from ordinary sea perils, even at the expense of their own subjects, it seems more than likely that the Declaration of 1856 will operate no alteration in this respect, and that insurances on enemy's property against any perils whatsoever, will be held invalid in the Courts of a belligerent.

¹ *The Fortuna*, 4 C. Rob. Ad. R. 278; *The Diana*, 5 C. Rob. Ad. R. 67; *MacLachlan, Shipping*, 491.

² *The Fanny*, 1 Dod. Ad. R. 443.

³ See the other articles, ante, p. 638.

PART III.

**OF LOSSES, AND THE RELATIONS OF THE ASSURED AND
UNDERWRITER THENCE ARISING.**

CHAPTER I.

LOSSES NOT COVERED BY THE POLICY.

By wear and tear - - -	719	By damage over statutory liability	734
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negligence of assured - - -	731	damage to a different subject-	742

BEFORE proceeding to consider that clause in the policy Wear and tear which enumerates the specific perils against which the underwriters engage to indemnify the assured, we will direct attention to certain general principles which, in all cases alike, limit and modify the underwriter's responsibility.

The first in order which we notice is this important limitation on the underwriter's liability, that he indemnifies the assured against such losses only as are caused by the direct and violent operation of the perils insured against, and not against loss by the ordinary wear and tear of the voyage.

A ship cannot navigate the ocean without suffering decay and consequent diminution of value, which we speak of as wear and tear; but the damage for which the insurer is answerable, whatever it be in degree, must wholly differ from this in point of cause, in the way already described. Such is the definite and very distinguishable rule.

The application however of this rule, apparently so plain and obvious, is often a matter of nice and critical discrimination. In fact, few things in the law of marine insurance have been found more difficult in practice than to discern between damage occasioned by the ordinary service of the

voyage, and damage caused by perils of the sea. A few of the more striking instances may suffice for illustration of the distinction in question.

If a cable be chafed by the rocks, or the fluke of an anchor broken off, in a place of usual anchorage, and under no extraordinary circumstances of wind and weather, this is ordinary wear and tear; if, on the other hand, the same thing were to occur in a place of unusual anchorage, or even in the usual anchorage ground under a gale of extraordinary violence, it is damage by perils of the sea for which the underwriter is liable.¹

If a mast be sprung, or spars snap, by the direct action of the wind, the fact itself proving the violence to have been extraordinary;²—if the ship in a heavy cross rolling sea pitch or lurch away her mast;³—if sails be blown from the gaskets by a squall;⁴—or masts be carried away in consequence of crowding a press of sail to avoid an enemy or a lee shore,⁵—these are instances of loss by perils of the sea, which consequently fall upon the insurer.

On the other hand, the insurer would have been free, if these things had happened through decay or in the ordinary service of the ship, and not by the direct and violent operation of any extraordinary casualty, such as is comprised among perils of the seas, in the sense which these words bear in policies of insurance.⁶

A leak, when wear and tear, and when average.

For instance, for a leak not traceable to the immediate and violent operation of some peril insured against, but arising from the unseaworthy state of the ship when she sailed, and a consequence only of that ordinary amount of straining to

¹ Benecke, Pr. of Indem. 456; Stevens on Average, 160; 1 Phillips, Ins. no. 1105.

² See 1 Phillips, Ins. no. 1105.

³ Stevens on Average, 166.

⁴ Benecke, Pr. of Indem. 454.

⁵ Covington v. Roberts, 2 B. & P. N. R. 378; Stevens on Average, 168.

Even here, Mr. Benecke thinks that,

except under extraordinary circumstances, this loss should not fall on the underwriters, "because the dangers in which those losses originate are occurrences which frequently take place, and which the vessel ought to be able to resist;" p. 455, *sed quare*.

⁶ Benecke, Pr. of Indem. 451; 1 Phillips, Ins. *qua supra*.

which she would unavoidably be exposed in the general and ordinary course of the voyage insured, the underwriter is not liable.¹ So it was held under a policy in respect of the laying and working of an electric cable across sea, where the cable failed through being insufficiently insulated, and the non-success was the natural result of the action of sea-water on the cable.²

Damage to the hull of a ship from defending her against an enemy, is not ordinary wear and tear, at all events as regards a merchantman,³ nor is damage by storm to the ship's upper works.⁴ But damage to the hull of the ship by worms and rats is, generally speaking, a loss falling within the ordinary wear and tear, and consequently not on the underwriters.⁵

With regard to copper sheathing, the right rule would seem to be, that the underwriter ought to be responsible for damage violently done to it by the direct operation of perils of the sea, as where it is torn or scraped off by rocks, in consequence of a storm; and not for deterioration, which, from age and the incidents of the voyage, can fairly be attributed to wear and tear.⁶ A recent attempt to exclude losses of this nature by setting up a custom at Lloyd's never to pay for damage to the hull below the water-line, except when the ship had taken the ground, was foiled by a special jury at Guildhall finding against the existence of such a custom.⁷

¹ *Fawcus v. Sarafield*, 6 E. & B. 199, and as cited by Blackburn, J., in *Dudgeon v. Pembroke*, L. R. 9 Q. B. 581, 595; *The Merchants' Trading Co. v. Universal Marine Ins. Co.*, cited per Blackburn, J., L. R. 9 Q. B. 596.

² *Paterson v. Harris*, 1 B. & S. 336; 30 L. J. (Q. B.) 354.

³ *Taylor v. Curtis*, 6 Taunt. 608; 2 Marshall's Rep. 309; *Stevens on Average*, 167, 168, *contra*. But see *Benecke, Pr. of Indem.* 456.

⁴ *Stevens on Average*, 161; *Benecke, Pr. of Indem.* 454; 1 Phillips, Ins. no. 1105.

⁵ As to worms, see *Rohl v. Parr*, 1 Esp. 244; 1 Phillips, Ins. no. 1101, p. 639; 3 Kent's Com. 300, note. As to rats, *Hunter v. Potts*, 4 Camp. 203; *Laveroni v. Drury*, 8 Exch. 166.

⁶ 1 Phillips, Ins. no. 1105.

⁷ *Harrison v. The Universal Marine Insurance Co.*, 3 F. & F. 191.

These are a few instances of the application of this rule; but after all much must be left to the judgment of practical men in each case, subject to this guiding principle, that whenever the loss can, upon a fair review of all the circumstances, be imputed to the ordinary wear and tear of the voyage, the underwriter is exempt from liability.

Inherent vice
of the thing
insured.

Upon the same ground, the underwriter is not liable for loss arising solely from a source of decay or corruption inherent in the subject insured, or, as the phrase is, from its proper vice;—as when fruit becomes rotten, or flour heats, or wine turns sour, not from external damage, but entirely from internal decomposition.¹ Accordingly where meat, shipped at Hamburg, became putrid through delay on the voyage occasioned by tempestuous weather, and was necessarily thrown into the sea, it was held to be no loss within the meaning of the policy.² So, if spontaneous combustion is generated by chemical change of the thing insured, owing to its being put on board wet or otherwise in a damaged condition, the underwriter is not liable.³ On the underwriter, however, it lies to show that the loss really arose from this cause.⁴

Leakage and
breakage.

Upon the same principle, the underwriter is not liable for the ordinary and inevitable amount of leakage and breakage to which wines, spirits, molasses, oil, earthenware, glass, and other liquid or brittle commodities are necessarily exposed in the usual course of even the most fortunate voyage. This is a rule of the general law maritime wherever the practice of marine insurance is known.⁵

¹ See all the authorities collected,
1 Emerigon, c. xii. s. ix. pp. 388–392.

² Taylor v. Dunbar, L. R. 4 C. P.
206.

³ 1 Emerigon, c. xii. s. xviii. § 4,
p. 430.

⁴ Boyd v. Dubois, 3 Camp. 132.

⁵ For the general principle, see 1
Emerigon, c. xii. s. ix. p. 389, who,
as usual, collects all the authorities.
See also Code de Commerce, art. 355;
Stevens on Average, 219.

Mr. Stevens, carrying the principle much further than the rule, states that by a custom at Lloyd's, articles liable to leakage and breakage, though not enumerated in the common memorandum, are always understood to be "free of average" (*i. e.* the underwriter, as to them, is liable for no partial loss, however great its amount may be), unless it be shown that the ship in the course of the voyage had struck the ground with such force as to damage her stowage.¹ Lord Denman, however, considering this an unreasonable usage, would not allow it to be given in evidence to defeat the claim of the assured.

The facts of the case were shortly these:—Thirty-six casks of oil insured from London to St. Petersburg, were safely stowed at the beginning of the voyage, but in the course of it, in consequence of the pitching and labouring of the ship in cross seas, they leaked to such an extent that ten of the casks were completely emptied, and the rest had lost a great part of their contents. The casks, however, had not shifted their places; in other words, "the stowage was not damaged." The defendants proposed to give in evidence the above custom at Lloyd's; but Lord Denman rejected the evidence, and told the jury to consider whether the loss was in fact caused by what they considered perils of the sea: and the jury being unable to agree, a verdict was taken by consent for the defendant.²

Crofts v. Marshall.

In our own country no fixed rule is laid down as to what shall be considered ordinary leakage and breakage on given articles on a given voyage. What is ordinary leakage and breakage.

In the United States, and generally on the Continent of Europe, a certain percentage is fixed, varying upon different articles, and upon voyages of different length and duration, as the ordinary amount of leakage and breakage for which the underwriter is in no case liable notwithstanding the ship be wrecked or stranded. Any leakage or breakage United States and the Continent.

¹ *Stevens on Average*, 219.

597, tried at Guildhall before a special

² *Crofts v. Marshall*, 7 C. & P. jury.

France.

beyond this average amount is a loss to the underwriter in case the ship be wrecked or stranded, but not otherwise. This average amount is generally fixed by the rules of the different insurance companies.¹ In the different forms of policy in use in France, stipulations to this effect are generally introduced.²

Commixture
no loss.

There may be a bursting of the wrappers, and a commixture of the contents, without any loss on that account, such as the insurer would be liable for. Where cotton wool belonging to different owners was shipped in bales by the same vessel, and encountered such a tempest on the voyage, that many of the bales were burst and the contents mingled, and the distinctive marks upon others of the bales were obliterated; there some of the owners refused to accept an apportionment of the cotton offered them by the shipowner, and demanded the full amount of the insurance as for a total loss; but it was held that the mere commingling of the cotton did not deprive the owners of their property in a proportionate quantity of the whole, and consequently that there was no loss thereby, within the meaning of the policy.³

Mortality
among
animals.

Upon the same principle under policies on living animals the underwriters are not liable for losses solely attributable to death from natural causes. As, for instance, if it be owing to any infectious disorder, which might equally have seized them on land, or to some disease which, though probably in part occasioned by the confinement and other usual circumstances of the voyage, is yet not proximately caused by any extraordinary, violent, or immediate agency of the perils insured against, the underwriters are undoubtedly not liable for the loss.

¹ 1 Phillips, Ins. no. 1090.

² See form of Bordeaux policy, Vaucher's Guide to Marine Ins. 40; Havre policy, *ibid.* 77; Nantes policy, *ibid.* 118, 119; Paris (Compagnie

Générale), *ibid.* 137, &c. See also the Amsterdam policy, *ibid.* 11, 13; Antwerp, art. 9, 10, *ibid.* 19.

³ Spence v. Union Marine Ins. Co., L. R. 3 C. P. 427.

Whilst negro slaves were regarded by the jurists of civilized and Christian Europe as mere live stock, it was gravely determined that death self-inflicted under the horror and despair of their condition was a loss arising from the proper vice and inherent pravity of the thing insured, and not chargeable, therefore, to the underwriters.¹

In another case it was a question whether loss from throwing overboard part of the human cargo of a slaver, owing to scarcity of water, occasioned by the captain having missed Jamaica, his port of destination, fell upon the underwriters, but a new trial was ordered.²

In a case of "mortality by mutiny of slaves," the following conclusions were come to by a special jury and Lord Mansfield:—1. That all the slaves who were killed in the mutiny, or died of their wounds, were to be paid for. 2. That all those who died of their bruises, which they had received in the mutiny, though accompanied by other causes, were to be paid for. 3. That all who had swallowed salt water or leaped into the sea and hung upon the sides of the ship, without being otherwise bruised, or who had died of chagrin, were not to be paid for.³

In the last case upon this subject in our books, it was decided that where negro slaves died on the passage from scarcity of food and water, caused by the extraordinary and unavoidable delay of the voyage, these deaths being due to the insufficiency of provisions, and not to the direct effect of the perils insured against, the loss was not such as falls upon the underwriters.⁴

Humiliating as it is to recall these cases, so unfavourable to our national probity, the principles established by them are still applicable to insurances on live stock.

¹ 2 Valin, Ordon. liv. 3, tit. vi. art. 11, 15; Pothier, d'Assurance, no. 66; and see M. Estrangin, *ibid.* Emerigon, to his great honour, shows a proper degree of repugnance to these disgraceful doctrines, c. xii, s. x. *Mort et Révolte des Nègres*, vol. i.

p. 392.

² *Gregson v. Gilbert*, 1 Park, Ins. 138; 2 Marshall, Ins. 560.

³ *Jones v. Schmoll*, cited 1 T. R. 130.

⁴ *Tatham v. Hodgson*, 1 Park on Ins. 141; 6 T. R. 656, *S. C.*

Thus, in a case where thirty mules, ten asses, and thirty oxen were insured "at and from Cork to Barbadoes and St. Vincent, warranted free of mortality and jettison," Lord Tenterden was of opinion, upon the authority of the case of *Tatham v. Hodgson*, just cited, that if the ship had been driven out of her course by perils of the sea, so as to protract the voyage and to exhaust the provisions, then the words, "warranted free from mortality," in the policy, would have protected the underwriters from liability for loss arising from such cause.¹

Death by violence not covered by the term mortality.
Lawrence v. Aberdein.

Where the perils of the sea are a concurring cause of the loss, it is often a matter of great difficulty to determine whether the underwriter is liable.

In the case just cited, where the underwriters expressly stipulated not to be liable for any loss caused by "mortality," it appeared that all the animals insured, except five mules and one ass, died on the voyage of severe bruises, lacerations, and injuries, arising from the violent pitching and rolling of the ship, occasioned by a furious storm and the consequent agitation of the sea, Lord Tenterden and the rest of the judges of the King's Bench decided, though not without some doubt, that this was a loss by perils of the sea, for which the underwriters were liable, and against which they were not protected by the warranty to be "free from mortality;" for the word mortality, in its ordinary sense, never means violent death, but death arising from natural causes.²

Gabay v. Lloyd.

In a subsequent case of the same kind, where horses were insured from Liverpool to Jamaica with the same warranty to be "free of jettison and mortality," the horses, after being properly secured between decks, came, by the labouring of the vessel in a violent storm, first to break the slings that supported them, and then to kick down the partitions between them, and being unable to stand by reason of the great rolling of the vessel, they kicked and bruised each

¹ Per Lord Tenterden in *Lawrence v. Aberdein*, 5 B. & Ald. 111.

² *Lawrence v. Aberdein*, 5 B. & Ald. 107.

other so violently that thereby, and by the injuries received from the pitching of the vessel, they all died in the course of the storm. The Court felt bound by their former decision to hold, that the underwriters were liable as for a loss by the perils of the sea.¹

The underwriter is liable for no loss which is not proximately caused by the perils insured against. *Causa proxima non remota spectatur* is necessarily a fundamental rule of law in general, but peculiarly obvious in its application to contracts of marine insurance; and this for the reason given by Lord Bacon, that "it were infinite for the law to consider the causes of causes, and their impulsions one on another, therefore it contenteth itself with the immediate cause."²

Losses not proximately caused by the perils insured against.

This maxim in practice has a two-fold operation—partly to limit, and partly to enlarge the underwriter's responsibility.

It enlarges the underwriter's responsibility in all such cases as those in which the underwriter is held liable for losses proximately caused by the perils insured against, though remotely occasioned by some other cause, such as the negligence of the master and crew of the insured ship.³

In so far as it tends to limit the underwriter's responsibility, it will be sufficient here to mention one or two illustrations of the rule.

Thus, loss by sale of goods to defray repairs in a port of distress, is not within the policy on goods;⁴ nor is a loss by

¹ *Gabey v. Lloyd*, 3 B. & Cr. 793.

² *Maxims of the Law*, Works, vol. vii. p. 327, cited by Lord Denman in *De Vaux v. Salvador*, 4 A. & E. 431. See a very remarkable discussion of the effect of this maxim in *Marine Insurance*, *per curiam*, *Ionides v. The Universal Marine Insur. Assoc.*, 14 C. B. N. S. 269; 32 L. J. (C. P.) 170.

³ *Busk v. Royal Exch. Ass. Co.*, 2

B. & Ald. 73, and the line of cases between that and *Redman v. Wilson*, 14 M. & W. 476; *Green v. Emalie*, Peake's N. P. 212; *Heyman v. Parish*, 2 Camp. 149; *Arcangelo v. Thompson*, *ibid.* 620; *Livie v. Jansen*, 12 East, 648; *Hahn v. Corbett*, 2 Bing. 205.

⁴ *Powell v. Gudgeon*, 5 M. & Sel. 431; *Sarquy v. Hobson*, 4 Bing. 131.

bottomry on cargo for the purposes of the ship;¹ nor is loss by fall of the market during the delay in estimating average damage, or loss at public auction occasioned by suspicion of damage;² nor is loss of freight by prudent management, within the policy on freight.³ So, loss of voyage by interdiction of commerce, blockade, or hostile possession of the port of destination, is not a risk within the policy, being the effect of a peril acting not immediately, but circuitously, on the thing insured.⁴ So, the wages and provisions of the crew during repairs, or during an embargo, are not a loss within the policy: yet this is so, rather because these form part of the ordinary expenses of the voyage.⁵

It often happens that the vessel is by the proximate action of sea perils delayed from reaching her destination by a certain date, or is disabled to continue performance under the charter-party, and that a clause in the charter-party enables the charterer in such an event to cancel the charter-party, or to put the vessel out of pay; in such a case the underwriter is not liable for the loss of freight, unless the policy is expressly drawn to cover the exercise of this option provided for in the charter party, for it is the exercise of this option which is the cause of the loss, although sea perils be the occasion.⁶

The word *consequences* is *prima facie* so opposite in effect to *causa proxima*, that the introduction of it into a policy taken in connection with the subsequent events gave rise to a discussion of great interest.

¹ Greer v. Poole, 5 Q. B. D. 272; 49 L. J. (Q. B.) 463.

² Cater v. Gt. Western Ins. Co. of New York, L. R. 8 C. P. 552.

³ Mordy v. Jones, 4 B. & Cr. 394; Philpott v. Swann, 11 C. B. N. S. 270; Scottish Mar. Ins. Co. v. Turner, 1 Maq. H. of Lds. C. 334.

⁴ Hadkinson v. Robinson, 3 B. & P. 388; Lubbock v. Rowcroft, 5 Esp. 67.

⁵ Fletcher v. Poole, 1 Park, Ins.

115; Eden v. Poole, *ibid.* 117; Robertson v. Ewer, 1 T. Rep. 127. Lord Denman, however, puts these cases on the ground of *causa proxima non remota spectatur*; De Vaux v. Salvador, 4 A. & E. 428.

⁶ Inman Steamship Co. v. Bischoff, 6 Q. B. D. 648; 7 App. C. 670; Mercantile Ship Co. v. Tyser, 7 Q. B. D. 73. See also Hough v. Head, 54 L. J. (Q. B.) 294; affirmed 55 L. J. (Q. B.) 43, C.A.

There was on a policy on goods from Rio to New York, “warranted free from capture, seizure, and detention, and all the consequences thereof, or of any attempt thereat, and free from all consequences of hostilities, riots, or commotions.” Civil war prevailed in the United States. The Confederates, being in possession of North Carolina, put out a very important light long established on Cape Hatteras on purpose to destroy the shipping of the Northern States. The ship in question, not aware of this extinction, looked to see the light when in the proper latitude. She had lost her reckoning; the night was dark and squally, with rain, the wind and tide setting upon the coast; and at midnight she grounded seven miles to the south-west of the lighthouse, where she became a total wreck. It was held, that although the ship would have seen the light, and been saved by it if there, yet the underwriters were not liable, as the only *consequence* known to insurance law was one that constantly followed the same cause.¹

Ionides v. The Universal Marine Ins. Assoc.

The difficulty of practically applying the rule relating to *causa proxima* is well shown in two cases, in which, upon a state of facts almost identical in both, Lord Denman and Story, J., came to diametrically opposite conclusions.

The facts of the English case were shortly these :—A ship in the Hooghly river came into collision with a steamer, and considerable damage was done to each : and under arbitration the award was, that each vessel should bear half the joint expenses of the two. The ship therefore had to pay a balance to the steamer, which the owner of the ship sought to recover back as a particular average loss, due to “the perils of the sea.” The Court of King’s Bench held, that he could not recover because the obligation to pay the sum in question was neither “a necessary nor a proximate effect of the perils of the sea, but one that grows out of an arbitrary

De Vaux v. Salvador.

¹ *Ionides v. The Universal Marine Assoc.*, 14 C. B. N. S. 259; 32 L. J. (C. P.) 170; followed in *Marsden v. City & County Assur. Co.*, L. R. 1 C. P. 232.

provision in the law of nations from views of general expediency.”¹

*Peters v.
Warren Ins.
Co.*

In the American case, under precisely similar circumstances, Story, J., delivering the judgment of the Supreme Court of Massachusetts, held the underwriters liable, on the ground that the damages so apportioned on the ship must be regarded as a direct and proximate effect of the collision.²

*Running
down clause.*

One effect of Lord Denman's decision has been the adoption of a *running down* clause, as it is called, specially providing against such a casualty. But even with such a clause, the right to recover for losses or expenditure will be limited by the terms in which the clause is drawn. For instance, if the only damage mentioned be damage to the ship run down, the assured finds himself unprotected as to demands beyond this, *e.g.*, for personal injuries sustained from the same collision by persons on board of either of the vessels.³ In another way he may sustain a loss without remedy under this special clause; that is to say, if he, after damage done to another ship by his own, stand by and see his ship sold under decree of the Court of Admiralty for a smaller sum than she is worth, his right against the underwriter is confined to the amount actually paid under the decree, and he cannot claim for loss by reason of the forced sale under decree.⁴ If the assured successfully defend an action for

¹ *De Vaux v. Salvador*, 4 A. & E. 420. This rule, long followed in the Court of Admiralty alone, is now incorporated with the Law of England, by the Judicature Act, 36 & 37 Vict. c. 66, s. 25, subs. 9, *MacLachlan, Shipping*, pp. 305, 306.

² *Peters v. Warren Ins. Co.*, 3 Sumner's Mass. Rep. 389. The only difference, in point of fact, between the American and English case is, that the former was determined by judicial decree, the latter by arbitration; but Story, J., disclaims the notion that, in point of principle, this

can make any difference between the two cases. Kent, C., approves of the decision: *Comm.* vol. iii. p. 301, note. Mr. Phillips elaborately dissents from the judgment of Story, J., and adopts the rule as laid down by Lord Denman, 2 Phillips, no. 1416.

³ *Taylor v. Dewar*, 5 B. & S. 58; 33 L. J. (Q. B.) 141, expressly at variance with the decision in *Coe v. Smith*, 22 Court of Sess. Cas. N. S. 955.

⁴ *Thompson v. Reynolds*, 7 E. & B. 172; 26 L. J. (Q. B.) 93.

loss by collision, such as would have fallen within the clause, he is yet not entitled to the costs of the defence.¹

Where the loss is the proximate effect of negligence or default on the part of the assured or his agents, or where it is the direct result of his wilful or reckless misconduct in placing the subject of the insurance in immediate contact with the destructive action of the perils insured against,—in such cases there is no liability of the underwriter.

Loss by
negligence,
default, or
misconduct.

"It is a maxim," says Lord Campbell, in *Thompson v. Hopper*,² "of our insurance law, and of the insurance law of all commercial nations, that the insured cannot seek an indemnity for a loss produced by their own wrongful act. The plaintiffs said truly that the perils of the sea must still be considered the proximate cause of the loss: but so it would have been if the ship had been scuttled, or sunk by being wilfully run upon a rock."

A case recorded by Emerigon as having actually occurred at the first breaking out of the great plague of Marseilles in 1720 was this—the master of a ship, part of whose crew had died of the plague on the voyage, sailed into that city with a false bill of health, in consequence of which his ship was ordered to be burnt: this misconduct was held to have discharged the underwriter.³

A ship, driven ashore near the harbour of St. Thomas (West Indies), was got off very little injured, and might have been repaired but for the negligence of the agents of the assured in the island, who allowed her to be condemned and broken up after two very hasty and imperfect surveys; Lord Tenterden told the jury that the underwriters would not be liable for the total loss by condemnation and sale, if, in their opinion, such loss had been brought about by the negligence or misconduct of the agents of the assured.⁴

Tanner v. Bennet.

¹ *Xenos v. Fox*, L. R. 4 C. P. 665.

² 6 E. & B. 191.

³ 1 Emerigon, c. xii. s. xiii. p. 429.

⁴ *Tanner v. Bennet*, Ryan & Mood.

182. See as to the *S. P.*, *Bradford v. Levy*, 2 C. & P. 137; *S. C.*, but not *S. P.*, Ryan & Mood. 331.

Of course, if the loss be directly referable to the act of the assured himself, the underwriter will, *a fortiori*, be discharged. For instance, at a port of refuge, he cannot by forcing a sale of a cargo which is partly damaged, thereby convert it into a total loss under a policy which is "free from average."¹ Failure to have the ship properly documented, according to existing treaties, discharges the underwriter from his liability, when the assured is the shipowner, though not, as the better opinion seems to be, when he is the owner of the goods.²

So, a failure to navigate a ship in war time, according to the provisions of the Convoy Acts, has been held to discharge the underwriter, whenever it can be shown that the assured himself was, by his own act, instrumental in the violation of the law, or that his agent had direct authority from him for that very purpose.³ In like manner, if loss of live stock be due to want of provisions occasioned by protraction of the voyage by storms; for the operative cause is the insufficient provisioning of the ship by the assured, or by those under contract with the assured.⁴

Secus, if the loss be through a mistake of judgment.

It is not, however, every mistake in judgment on the part of the assured or his agents that discharges the underwriter, although such mistake may have immediately brought about the loss; if they acted, though erroneously, yet with reasonable prudence, and a *bonâ fide* desire to do the best for all concerned, he is still liable.

Wilbraham v. Wartnaby.

Thus, where a cargo of arms and ammunition was shipped and insured from London to Madeira, the agent of the shippers at the latter place, acting under the mistaken impression that the importation of such articles was prohibited by the treaty between Portugal and Great Britain, and lest it should be supposed that the arms were imported with an insurrectionary purpose, informed the governor of the expected consignment, who, consequently, seized the

¹ *Myer v. Ralli*, 1 C. P. D. 358.

² *Dawson v. Atty*, 7 East, 367;
Ball v. Carstairs, 14 East, 374. Ante,
pp. 681, 683.

³ *Carstairs v. Allnutt*, 3 Camp.
497; *Metcalfe v. Parry*, 4 Camp.
123.

⁴ *Tatham v. Hodgson*, 6 T. R. 656.

arms and ammunition immediately on their arrival; Lord Tenterden held, that the underwriter was not discharged from his liability, on the ground that this loss was the act of the assured, for the agent had acted *bond fide* and with reasonable prudence.¹

Where the loss arises from causes which the owners or master of a ship are bound, by their duty as carriers, to prevent or which they might have prevented by a due exercise of reasonable and ordinary vigilance, the underwriter is discharged from his liability. (Loss by neglect of duty.)

Thus, the underwriter is not liable for loss occasioned to the goods by bad stowage,² or to the ship if she was thereby rendered unseaworthy at setting out; nor for loss sustained by the goods from rats,³ even though there are cats on board,⁴ unless, indeed, the rats were to make a hole in the ship, and the loss were proximately to be by perils of the sea.⁵

Upon the same principle, the underwriter is not liable for loss occasioned by theft (*furtum* or larceny, as distinct from *latrocinium* or robbery accompanied with violence), or embezzlement when committed by the crew, even although the risk of "thieves" is one of the enumerated risks in all our common policies; for it is considered that loss of this kind might be guarded against by the exercise of ordinary vigilance on the part of the master; consequently the master, or the owner, whom he represents, is alone answerable for a loss of this kind;⁶ but for open robbery Theft, robbery.

¹ *Wilbraham v. Wartnaby*, Lloyd & Wels. 144. The contention on the part of the underwriters appears to have been that but for this information to the governor, the arms would have been landed before seizure, and therewith their liability would have ceased.

² See *Emerigon*, c. xii. ss. ii., iv., v., who collects all the learning upon these points.

³ *Consolato del Mare*, c. lxv., lxvi., of the Italian translation; 1 *Emerigon*, c. xii. s. iv. p. 375; 3 *Kent*, Comm. 300.

⁴ *Laveroni v. Drury*, 8 Exch. 166; 22 L. J. (Exch.) 2, which fixes the rule as in the text.

⁵ *Ibid.* This is a case which, as all sailors and naturalists are aware, is not likely to occur.

⁶ See 1 *Emerigon*, c. xii. s. v. p. 380; and see also s. xxix. *ibid.* 524; 4 *Boulay-Paty*, 35; 3 *Kent*, Comm. 303.

(latrocinium) the underwriters are liable; and the owners also, subject to the statutory limitation.¹

Default.

In the same way, if any loss or damage happen in the shipping or landing of the goods through the fault of the master or crew, or the defect of the ship's tackle, the master and the owners are respectively answerable; if such loss be due to other causes named in the policy, the underwriters are liable.² So, the loss of goods lashed on deck, that being considered an improper and unsafe place to carry them, is not recoverable under a policy on goods, unless they are so carried by express permission inserted in the policy, or by virtue of a general usage of trade, with which the underwriter must be presumed to have been familiar.³

Limitation
of owner's
responsibility
for loss.

At common
law.

The extent of the shipowner's responsibility for damage caused to goods or to another ship by the acts of the master or mariners, whether under the civil law, or under the common law of England, is limited only by the full amount of the loss or damage sustained.⁴

By statute.

With a view to encouraging the shipping interest, our legislature has at different times passed various Acts in order to limit this responsibility.⁵ The statutory provisions now in force are the following:—

Limitation of
Liability.

“No owner of any sea-going ship or share therein shall be liable to make good any loss or damage that may happen without his actual fault or privity of or to any of the following things; (that is to say,)

¹ Harford v. Maynard, 1 Park, 36; and see *infra*.

² 2 Emerigon, c. xii. s. xlvii. p. 24, citing Le Guidon, c. v. art. 7; Jugemens d'Oleron, art. 10; Ord. de Wisbuy, art. 49.

³ Ross v. Thwaite, 1 Park, Ins. 23; Backhouse v. Ripley, *ibid.* 24; Da Costa v. Edmunds, 4 Camp. 142; Gould v. Oliver, 4 Bing. N. C. 134; Milward v. Hibbert, 3 Q. B. 120;

Clarkson v. Young, 22 L. T. N. S. 41; Maclachlan, Shipping, 665, *et seq.*

⁴ Maclachlan on Shipping, 121, *et seq.*; 2 Emerigon, *Contrats à la Grosse*, c. iv. s. ii. p. 482.

⁵ As to the motives of the legislature, see the preamble of 7 Geo. 2, c. 15; the remarks of Lord Tentenden in Gale v. Laurie, 5 B. & Cr. 163; and of Parke, B., in Brown v. Wilkinson, 16 L. J. (Exch.) 36.

- “(1) Of or to any goods, merchandise, or other things whatsoever taken in or put on board any such ship by reason of any fire happening on board such ship ;
- “(2) Of or to any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board any such ship, by reason of any robbery, embezzlement, making away with or secreting thereof, unless the owner or shipper thereof has, at the time of shipping the same, inserted in his bills of lading or otherwise declared in writing to the master or owner of such ship the true nature and value of such articles ;
- “To any extent whatever.”¹

Sect. 54 of the 25 & 26 Vict. c. 63.—“The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say,

- (1) Where any loss of life or personal injury is caused to any person being carried in such ship ;
- (2) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship ;
- (3) Where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat ;
- (4) Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat ;

be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate

¹ Shipping Act (17 & 18 Vict. c. 104), s. 503.

amount exceeding fifteen pounds for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steam ships the gross tonnage without deduction on account of engine room:¹

"In the case of any foreign ship which has been or can be measured according to British law, the tonnage as ascertained by such measurement shall, for the purposes of this section, be deemed to be the tonnage of such ship:

"In the case of any foreign ship which has not been and cannot be measured under British law, the Surveyor General of tonnage in the United Kingdom, and the chief measuring officer in any British possession abroad, shall, on receiving from or by direction of the Court hearing the case such evidence concerning the dimensions of the ship as it may be found practicable to furnish, give a certificate under his hand stating what would in his opinion have been the tonnage of such ship if she had been duly measured according to British law, and the tonnage so stated in such certificate shall, for the purposes of this section, be deemed to be the tonnage of such ship."

These important provisions, cited from the 25 & 26 Vict. c. 63, are held to apply in favour of a foreign as well as a British ship in any waters whatever, and totally irrespective of British jurisdiction.² Section 503 of the 17 & 18 Vict. c. 104 has hitherto been held to apply only to British ships.

Section 55 of the 25 & 26 Vict. c. 63, provides for the legality of insurance against losses within the meaning of section 54; thus:—"Insurances effected against any or all

Insurances
under the
Shipping
Acts.

¹ The wrong doer is liable besides for the costs of suit; *The Dundee*, 1 Hagg. Ad. 109; *The John Dunn*, 1 W. Rob. 159; *The Volant*, *ibid.* 390, and for interest on the statutory

amount from the time of the wrong; *Smith v. Kirby*, 1 Q. B. Div. 131; *The Northumbria*, L. R. 3 A. & E. 6.

² *The Amalia*, 32 L. J. (Ad. & P. C.) 191.

of the events enumerated in the section last preceding, and occurring without such actual fault or privity as therein mentioned, shall not be invalid by reason of the nature of the risk."

The insurances referred to in this 55th section may be effected without policy, being specially exempted by the statutory provision requiring every other sea insurance to be so effected and expressed.¹ They have also given rise to a new class of Insurance Companies, commonly known as Ship-owners' Protection Societies or Clubs.

Need not be made by policy.

There are two classes of cases in which loss may be occasioned by the public authoritative acts of the government of the assured,—those, viz., in which the assured and underwriter are both subjects of the same state, and those in which they are subjects of different states.

Loss by the acts of the government of the assured.

In the former class of cases it may now be taken as settled law, that the underwriter is liable for all loss occasioned by the public acts of the home government, in detaining, arresting or laying an embargo on the ship either in the home or a foreign port.²

In the latter class the nature of the conclusion justified by law will differ according as there is war or peace between the two powers. We have already seen that an insurance on enemy's property is illegal.³ We may add that a policy, legal when made, may become invalid by what is tantamount to a declaration of hostilities between the government of the assured and that of the insurer.⁴

Lord Ellenborough, however, founding on a case of that

¹ 30 & 31 Vict. c. 23, s. 7.

² *Page v. Thompson*, at N. P., *Park on Ins.* 175; *Green v. Young*, 2 Lord Raym. 840; *S. C.*, 2 Salk. 444; see also the dicta of Lord Alvanley in *Touteng v. Hubbard*, 3 B. & P. 302; 3 Kent, Comm. 291. The law is the same in France, Co.

de Com. art. 369, 370, giving the right to abandon "en cas d'arrêt de la part du Gouvernement après le voyage commencé."

³ *Ante*, p. 701.

⁴ *Touteng v. Hubbard*, 3 B. & P. 291; *Aubert v. Gray*, 3 B. & S. 163, 169; 32 L. J. (Q. B.) 50.

kind, and assuming that it rested on a principle of general application, identified the assured with his government in the case before him where an embargo had been laid upon native shipping during a time of peace and in no hostile spirit to any foreign power, and for that reason held the insurer not liable.¹ No little confusion followed this generalization of a very restricted rule.² The right rule of law was declared by a Court of Error in *Bazett v. Meyer*,³ and would have rested there but for the case of *Campbell v. Innes*.⁴ The question was again raised in very recent times, and it is to be hoped finally set at rest by the decision of the Exchequer Chamber affirming that of the Queen's Bench, that the assured is not to be identified with the acts of his own government unless the existence of hostilities between it and the government of the insurer renders any such contract of indemnity incompatible with that highest law—the *salus populi*—under the insurer's government.⁵

In the United States.

In the United States, the whole question has come before the consideration of the Supreme Court, and it has there been held, agreeably to the declared principle of the decisions by the English Exchequer Chamber in *Bazett v. Meyer*, and *Aubert v. Gray*, that a subject is not to be deemed a party to the peaceful acts of his own government, so as thereby to deprive him of remedy on a policy effected with foreign underwriters in respect of losses caused by such acts.⁶

In the law maritime received on the Continent of Europe, the compulsory abandonment of the voyage, occasioned by

¹ *Conway v. Gray*, 10 East, 536; *Conway v. Forbes*, *ibid.*; *Murray v. Shedden*, *ibid.*

² *Mennett v. Bonham*, 15 East, 477; *Flindt v. Crockatt*, *ibid.* 522; *Flindt v. Scott*, *ibid.* 525; *Simeon v. Bazett*, 2 M. & Sel. 94; *Campbell v. Innes*, 4 B. & Ald. 423.

³ 5 Taunt. 824, 829; and see *Flindt v. Scott*, *ibid.* 674.

⁴ 4 B. & Ald. 423.

⁵ *Aubert v. Gray*, 3 B. & S. 163, 169; 32 L. J. (Q. B.) 50.

⁶ *Francis v. Ocean Ins. Co.*, 2 Wend. Sup. C. Rep. 64, cited 3 Kent, Comm. 292.

the interdiction of commerce with the port of destination, after the commencement of the risk, or by its hostile occupation, embargo, or blockade, is considered to be a risk covered by the policy, and recoverable either as caused by "a restraint of princes," within the true meaning of those words in the common printed forms;¹ or under the words "compulsory change of voyage," which are introduced into the majority of the foreign policies.²

Loss of voyage by interdiction of commerce, or by blockade or embargo.

Foreign law.

In this country, however, it has been repeatedly decided and must now be taken as clear insurance law, that neither interdiction of trade at the port of destination after the risk commenced, nor interception of the voyage by blockade, or by the imminent and palpable danger of capture or seizure, amounts to a peril for which English underwriters are answerable under the common form of policy, either as an "arrest, restraint, and detention," or in any other way whatever.³

English law differs.

The principle on which these decisions rest, is the maxim, *Principle.*
Causa proxima non remota spectatur: "the cause of loss must be a peril acting upon the subject insured, immediately and not circuitously;" as is held to be the case where the loss arises from the ship's being prevented from completing her voyage by the impossibility of entering her port of destination without being captured.

A cargo of pilchards insured, "free of average," by an English ship from the coast of Cornwall to Naples, was sailing under convoy, when intelligence arrived that the ports of Naples were shut against English vessels. She thereupon put into Port Mahon, Minorca, and sold her cargo; and the assured abandoned and claimed a total loss. Lord Alvanley, on this point, held the underwriters were not liable. "Where underwriters," his lordship says, "have insured against capture and restraint of princes, and the

Hadkinson v. Robinson.

¹ Emerigon, as usual, is the great source of learning on the point, see chap. xii. s. 31,—*Interdiction de Commerce*, vol. i. p. 533.

² *Vaucher, passim.*

³ *Hadkinson v. Robinson*, 3 B. &

P. 388; *Lubbock v. Rowcroft*, 5 Esp. 50; *Blackenhagen v. London Ass. Co.*, 1 Camp. 454; *Parkin v. Tunno*, 11 East, 22; 2 Camp. 69; *Forster v. Christie*, 11 East, 205.

captain learning that if he enter the port of his destination the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated—such circumstances do not amount to a peril operating the total destruction of the thing insured. The doctrine (that the assured might abandon in respect of a loss of voyage) is only applicable to cases in which the loss is occasioned by a peril insured against; which, as it appears to me, must be a peril acting upon the subject insured, immediately, and not circuitously as in the present case.”¹

This decision has been implicitly followed by the English Courts in all subsequent cases of the same kind.

*Lubbock v.
Rowcroft.*

Thus, the assured on goods, finding when arrived at Port Mahon, that Messina, the port of destination, was in the hands of, or blockaded by, the French, abandoned and sued as for a total loss; and Lord Ellenborough held that he could not recover.²

*Parkin v.
Tunno.*

Under a similar policy “from Bristol to Monte Video, or any other port in the River Plate possessed by the English,” the ship, immediately on her arrival out, was ordered away by the English commander of Maldonado, the only one of the three ports in the Plate then left in the hands of the English. She put into Rio Janeiro, the nearest friendly port, to obtain supplies and repairs, and on the way the goods were sea-damaged, and for such damage as a loss by perils of the sea the assured sued the insurers. The necessity, it was argued, under which the ship sought the nearest port of safety should entitle her to the protection of the policy on the voyage thither. Lord Ellenborough would not even hear it argued that the assured could recover in respect of any loss after the ship had been turned away.³

*Forster v.
Christie.*

So, a British ship, bound for St. Petersburg, being detained in the Baltic by the commander of convoy under

¹ *Hadkinson v. Robinson*, 3 B. & P. 388. See also *M'Swinney v. The Roy. Exch. Ass. Co.*, 14 Q. B. 646; *Halhead v. Young*, 6 E. & B. 312;

Chope v. Reynolds, 28 L. J. (C. P.) 194.

² *Lubbock v. Rowcroft*, 5 Esp. 49.

³ *Parkin v. Tunno*, 11 East, 22.

apprehension of a Russian embargo, the owners gave notice of abandonment and sued for a total loss; and Lord Ellenborough held, with a similar refusal to hear the point argued as in the last case, that the underwriters were not liable.¹

In our law, then, the position is clearly established, that an interdiction of commerce with the port of destination, by means of a blockade, or embargo, or possession of the port by an enemy, is not a peril within the policy; and it would seem, notwithstanding Mr. Arnould's doubts, that the position so established is in accordance with the principles of marine insurance law, as applied under other circumstances also, besides those that are here specially discussed.²

The law of the United States upon this point is in a somewhat indeterminate condition. Decisions of great authority are to be found almost in equal number on either side of the question, so equally balanced seemingly in the mind of Mr. Phillips that he rests content with a statement of the cases, but without any expression of opinion.³ These are decisions by the State Courts. The question seems not to have come before the Supreme Court, except upon a state of facts that admitted, I think, of an opinion but one way, even in the United States; for an abandonment of the voyage through fear of capture occasioned by false intelligence, was of course held to be no loss within the policy.⁴

In the United States.

In the absence of any express exception thereof the underwriter, as we have seen,⁵ is liable for loss arising from the attempted violation of the revenue laws of foreign states;⁶ but this is so, only in as far as he is proved, or must in fairness be presumed, to have been cognisant at the time of

Losses for violation of foreign revenue laws.

¹ *Forster v. Christie*, 11 East, 205.

Cranch, 71; 2 Wash. C. C. 300.

² See ante, p. 727, and post, Chap. VIII., *Loss of Voyage*.

⁵ Ante, p. 693.

³ 1 Phillips, c. xiii. s. 10. To the same effect, 1 Parsons, Ins. 585, 586.

⁶ *Emerigon*, c. xiii. s. 51, p. 30, et seq.; *Planché v. Fletcher*, 2 Dougl. 251; *Lever v. Fletcher*, 1 Marshall,

⁴ *King v. Delaware Ins. Co.*, 6

Ins. 56.

underwriting the policy of the intention to violate them. Consequently, where a policy was effected in France "on silk stuffs," from Spain to a French port, since the exportation of such goods was well known to be prohibited by the revenue laws of Spain, the underwriter was held liable for loss occasioned by their seizure in Spain.¹

Risk aggravated by subsequent events.

It is a general principle, applicable to all risks assumed by underwriters, that they continue liable for losses by the perils insured against, although the risk is greatly enhanced by events that the assured could not prevent. Thus, if capture be one of the perils insured against, and after the policy is made, the risk of capture is greatly increased by the breaking out of war, it is clear insurance law that the underwriter, nevertheless, continues liable on the policy.² But if it has thereby become a policy upon enemy's property, it is in consequence rendered invalid.

Insurance on one subject, loss on another.

As a general principle, the underwriter on one subject of insurance has nothing to do with losses, charges, or contributions imposed upon it by reason, or on account, of another.

Thus, the underwriter on goods has nothing to do with freight; all that he insures being the safe arrival of the goods. Hence, it is a well-established principle in the law of marine insurance, that, although goods arriving in species sea-damaged pay the same freight as they would if they arrived sound, the underwriter on goods cannot be charged with the detriment arising from this liability for undiminished freight on a diminished value;³ nor can he be charged with any *pro rata* freight the merchant may have to pay the

¹ 2 Valin, tit. vi. art. 49, pp. 127, 128, and the opinion of Emerigon there given.

² Planché v. Fletcher, 2 Dougl.

251; Brandon v. Nesbitt, 6 T. R. 23.

³ Benecke, Pr. of Indemnity, c. i.

shipowner.¹ But it seems scarcely doubtful that he is liable for the increased freight which the assured is obliged to pay in case of transshipment occasioned by the perils insured against.²

On the same principle, the underwriter on goods cannot be made liable for a loss incurred by a forced sale of the goods for repair of the ship,³ or for loss by fall of the market during delay in estimating an average damage, or loss at public auction occasioned by suspicion of damage;⁴ nor the underwriter on ship for expenses incurred by detention of the goods.⁵

If, indeed, the casualty that destroys or damages one subject of insurance has the effect of producing a total or partial loss upon another, the underwriters on the latter subject of insurance are chargeable for the loss thus caused. Thus, the perils of the sea that destroy or swallow up ship and goods, give a direct claim to a total loss against the underwriters on freight or profits, the earning of which has been rendered impossible by the direct effect of the casualty.

¹ *Baillie v. Moudigliani*, 1 Park, Ins. 116.

² See *Shipton v. Thornton*, 9 Ad. & Ell. 336, 337; *Matthews v. Gibbs*, 30 L. J. (Q. B.) 55. See the rule as it is laid down in *Rosetto v. Gurney*, 11 C. B. 176, 188.

³ *Powell v. Gudgeon*, 5 M. & Sel. 431; *Sarquy v. Hobson*, 4 Bing. 131.

⁴ *Cator v. Gt. Western Ins. Co. of New York*, L. R. 8 C. P. 552.

⁵ *Bradford v. Levy*, 1 Ry. & Mood. 331.

CHAPTER II.

LOSSES COVERED BY THE POLICY.

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Clause in
policy.

THE clause in our English policies, enumerating the “adventures and perils” against which the underwriters undertake to indemnify the assured, is as follows:—“Touching the adventures and perils which we, the assurers, are contented to bear, and do take upon us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise, and ship, &c., or any part thereof.”

Loss by perils
of the seas.

Of all the causes of loss enumerated in our common policies, the most frequent and important are those comprised under the term “Perils of the Seas.” These words embrace all kinds of marine casualties, such as shipwreck, foundering, stranding, &c.; and every species of damage to the ship or goods at sea by the violent and immediate action of the

winds and waves, not comprehended in the ordinary wear and tear of the voyage, or directly referable to the acts and negligence of the assured as its proximate cause.

We proceed to consider the different classes of loss proximately caused by perils of the sea.

Foundering at sea, when proximately caused by the fury of storms and tempests, is an obvious instance of loss by perils of the sea. The only difficulty is the proof of the loss where the ship founders with all on board, or after the crew have left and lost sight of her. Foundering at sea.

In such cases it is presumed, if not heard of at all for a reasonable time after sailing, or after she was last seen, that she has foundered at sea. The period of time after which this presumption shall take effect, is positively fixed, for voyages of different length and duration, by the laws of many of the Continental states. Presumptive proof of.

By the French Code de Commerce it is a period of one year for ordinary, and two years for distant voyages; and in respect of time policies, it is declared that the loss in such cases shall be presumed to have taken place within the limits of the risk.¹ The result of the last provision is, that in the case of a missing ship, the loss, in the modern law of France, is presumed to have happened immediately after the last news. Thus, a ship insured for three months, and not heard of, is then further insured for a year, and the vessel is never heard of; the first insurer in that case pays the loss.² Period.

In our law there are no such fixed or commonly recognized periods of limitation, after which the presumption of loss arises; each case being considered in relation to its own circumstances.

Thus, a ship insured "from North Carolina to London," had not been heard of for four years after she sailed, when

¹ Co. de Com., art. 375, 376. For the French law on the point generally, see Pothier, d'Assurance, no. 119—122; 2 Valin, Com. liv. 3, tit. vi. art. 58, p. 141; 2 Emerigon, c.

xiv. s. 4, pp. 141—149, with the Commentary of Boulay-Paty.

² 4 Boulay-Paty, Droit Mar. 252, et seq.

the action was brought; this was held sufficient presumptive proof of an averment in the declaration, that the loss had happened "by her sinking at sea."¹ A ship insured from Havannah to Flanders, a voyage of the average length of seven weeks, had not been heard of for nine months when the action was brought; this was held sufficient proof of foundering at sea.²

Proof.

As a foundation for any presumption of this kind, it must be proved that the ship, when she left the port of departure, was really bound for and sailed on the voyage insured.³ It is not requisite, however, in further support of this presumption when once raised, to call witnesses from the foreign out-ports to prove the fact that the ship has never been heard of there; as, in case of a ship on a voyage from Liverpool to Miramichi, in the Dominion of Canada, and thence to Hayti, it was held unnecessary to call witnesses from Miramichi, to support the averment that the ship, before reaching Miramichi, had been lost by the perils of the sea.⁴

If it be proved that the ship sailed for a given port, the fact of her never having arrived there, supposing a reasonable time for such arrival to have elapsed before action brought, coupled with the prevalence of a rumour at her port of departure that she had foundered at sea, will be sufficient *prima facie* evidence of a loss by the perils of the sea; and even although the crew have been saved, it will not, in the first instance, be necessary to call any of them to corroborate, by direct evidence, the presumption thus raised, nor to show that the plaintiff could not procure their attendance, especially in the case of a foreign ship.⁵ This case seems to dispose of the point which was left undecided in the *Nisi Prius* decision of *Koster v. Innes*, viz., whether the non-arrival of the ship

¹ *Green v. Browne*, 2 Strange, 1199. See also *Newby v. Reid*, 1 Marshall, Ins. 490.

² *Houstman v. Thornton*, Holt, 242.

³ *Cohen v. Hinckley*, 2 Camp. 51; *Koster v. Innes*, Ry. & Mood. 333.

⁴ *Twemlow v. Oswin*, 2 Camp. 85. In this case the only witness called was the clerk of the owners, who swore the ship had never been heard of since she sailed.

⁵ *Koster v. Reed*, 6 B. & Cr. 19.

at the port of destination is evidence of loss by foundering where the crew have been heard of after the vessel sailed, and after she is supposed to have been lost.¹

Shipwreck, when caused by the ship being driven ashore, *Shipwreck.* or on rocks and shoals in mid-seas, by violence of the winds and waves, is also a clear case of loss by perils of the sea. As regards its effect upon the ship, and the right of the assured to recover, it is of different kinds.

A ship may be wrecked in pieces, so as to become a mere congeries of planks; this is a clear case of total loss, without notice of abandonment. Or it may be so shattered and injured as to be irreparable for the purpose of navigating the seas again, except at a cost greater than her worth when repaired; this loss is considered total, at all events, on giving notice of abandonment. Or, again, though much broken and shattered, it may still retain the form of a ship, and be capable of being repaired for a sum less than her value when repaired; in which case the assured will be entitled to recover only for an average loss.

Different kinds of shipwreck.

All these cases alike,—though the amount of damage, and the mode in which the assured acquires a right to indemnity, either in proportion to the actual damage or for the full amount of the insured value, is different,—yet all alike fall within the meaning and effect of loss by “perils of the sea.”²

So, that which is the immediate and necessary consequence of the wreck is attributable to the same cause of loss. A Russian vessel, from London to Constantinople, ran on a shoal near Gallipoli, and the master at once disembarked bullion of the value of 50,000*l.*, which formed part of the cargo, and placed it in the hands of the Russian Consul. Afterwards,

¹ *Koster v. Innes*, Ry. & Mood. 333.

² The different degrees of shipwreck (naufrage, bris absolu, bris partiel, échouement avec bris, échouement

sans bris, &c.) are very accurately defined in French law. The best explanation I have met with of these different terms is in 4 Boulay-Paty, Droit Mar. 12.

this bullion was charged by sentence in the Russian consular court, with a per-centage, to meet the expense of trying to save the ship and rest of the cargo. This charge was held to be a loss by perils of the sea which fell upon the insurers of the bullion.¹

Stranding.

Loss by "*stranding*" is a loss by perils of the sea, for which the underwriter is liable, unless it falls within the range of any of those principles by which his responsibility is limited. If, indeed, the ship takes the ground in the usual course of the voyage, and not by the intervention of any extraordinary casualty, the injury arising therefrom is mere wear and tear; there must be something fortuitous, accidental, and not necessarily arising in the ordinary course of the voyage, to make the underwriters liable.

What stranding is within the policy.

Fletcher v. Inglis.

A transport in government service took the ground in Boulogne harbour on the ebbing of the tide, and the bottom being hard and uneven, a cracking sound was heard in the ship as of something breaking. On the return of the tide, there was a considerable swell in the harbour; the ship struck the ground hard several times, and in the morning eighteen of her knees were found to be broken; this was held to be a loss by perils of the sea.²

Magnus v. Buttemer.

In this instance there was a *casus fortuitus* by reason of the ground swell setting into the harbour: but in a case where nothing fortuitous or unexpected occurred, the ship being, in the ordinary course of her voyage, afloat when the tide was in, and on the ground when the tide was low, became in consequence hogged or strained all over; it was held, by the Court of Common Pleas, that this did not

¹ Dent v. Smith, L. R. 4 Q. B. 414.

² Fletcher v. Inglis, 2 B. & Ald. 316: *sed quare*. This seems at best to be a very doubtful case. The circumstances were the ordinary circumstances of such a har-

bour, and the consequences such as might be looked for under the circumstances. The considerable swell on the return of the tide is so usual that the absence of it is the exception and a rare one.

constitute a loss by perils of the sea for which the underwriters were liable, there having been no accident.¹

In a graving dock a ship was damaged by being blown over in a violent gust of wind; this was held not to be a loss, technically, by "perils of the sea," but rather falling within the general clause—"other perils and misfortunes."²

Phillips v.
Barber.

A ship that was being hove down for repairs, was found incapable of bearing the strain, and was therefore hauled up on the beach, where she bilged. Lord Kenyon held this not to be a loss by perils of the sea.³ So where a ship was hove down on the beach within the tideway to be cleaned, and the tide flowed and knocked away the shores which supported the ship, in consequence of which she fell over, and damaged her side planking, Mansfield, C. J., held this no loss by perils of the sea, and nonsuited the plaintiff.⁴

Rowcroft v.
Dunsmore.

Thompson v.
Whitmore.

In order to sustain the allegation of loss by perils of the sea, or by any other cause, it must be shown that the cause assigned was the proximate cause of the loss.

Proximate
cause of loss.

It is not always an easy thing to distinguish, for the purposes of insurance law, what was the proximate cause of the loss. It is not always easy to show that the destruction of property situate like a ship on the surface of the deep is not due to perils of the sea as the proximate cause. On the other hand, it is occasionally difficult to determine among competing contributory causes ending in the submergence and loss of the ship in the ocean, that the efficient proximate cause was perils of the sea.

"It is a maxim of our insurance law," says Lord Campbell, giving judgment in *Thompson v. Hopper*,⁵ "and of the insurance law of all commercial nations, that the assured cannot seek an indemnity for a loss produced by their own

¹ *Magnus v. Buttemer*, 11 C. B. Taunt. 227.
876; 21 L. J. (C. P.) 119.

² *Phillips v. Barber*, 5 B. & Ald. 227.
161.

³ *Rowcroft v. Dunsmore*, cited 3

⁴ *Thompson v. Whitmore*, 3 Taunt.

⁵ 6 E. & B. 191.

wrongful act. The plaintiffs said truly that the perils of the sea must still be considered the proximate cause of the loss; but so it would have been if the ship had been scuttled, or sunk by being wilfully run upon a rock. According to the statement in this plea, the plaintiffs efficiently caused the loss by their own wrongful act.”¹

“In all cases,” says Blackburn, J., delivering judgment in *Dudgeon v. Pembroke*,² “the law regards the proximate cause of the loss, and it would be difficult to find a better example of what Lord Bacon calls the infinity of the ‘causes of causes, and their impulsion one on the other,’ than is afforded in this case. The ship perished because she went ashore on the coast of Yorkshire. The cause of her going ashore was partly that it was thick weather and she was making for Hull in distress, and partly that she was unmanageable because full of water. The cause of that cause, viz., her being in distress and full of water, was, that when she laboured in the rolling sea she made water, and the cause of her making water was that when she left London she was not in so strong and staunch a state as she ought to have been; and this last is said to be the proximate cause of the loss, though since she left London she had crossed the North Sea twice. We think it would have been a misdirection to tell the jury that this was not a loss by perils of the seas, even if so connected with the state of unseaworthiness as that it would prevent any one who knowingly sent her out in that state from recovering indemnity for this loss.”

Whatever difficulty may attend the discriminating of what was the operative, efficient, proximate cause of the loss in any particular case, the necessity as well as importance of making the discrimination is brought into prominence frequently by the effect of express warranties.

Thus a ship, insured “against capture only,” was driven by stress of weather on the enemy’s coast, and there, without

*Green v.
Elmalie.*

¹ Per Lord Campbell, delivering judgment on demurrer to the pleas, 6 E. & B. 191.

² *Dudgeon v. Pembroke*, L. R. 9 Q. B. 581, 595. And so *S. C.*, 2 App. Cas. 284.

having received any material damage by the stranding, was captured by the enemy; this was held to be a loss, not by perils of the sea, but by capture, and therefore recoverable under the policy.¹

Where ship and goods, "warranted free from American condemnation," were damaged by perils of the sea, and were driven ashore in such a position as to be afterwards seized and condemned by the American government, Lord Ellenborough held that the subsequent total loss by seizure and condemnation took away any right to recover in respect of the previous partial loss by perils of the sea.² This case proceeded on the principle pointed out by Lord Campbell, that "if a total loss occurs from which underwriters are exempt, they are not liable for prior partial loss unrepaired, which, in that event, does not prove prejudicial to the assured."³

Livie v. Jansen.

On the other hand, if the loss by perils of the sea is in itself total, it is not deprived of that character by the chance rescue of part from destruction and appropriation thereof by an enemy.

Nature of loss not changed by chance appropriation.

Thus, under a policy on goods "warranted free from capture and seizure,"—"London to Maracaybo," the ship, a few miles from Maracaybo, was driven on a sandbank in the open roadstead and totally disabled, and while in that situation the goods, which would otherwise have been entirely engulfed by the sea, were taken out and carried off by the Spanish soldiers who manned a neighbouring fort; Best,

Hahn v. Corbett.

¹ *Green v. Elmslie*, Peake, 212. "Had the ship been driven on any other coast but that of an enemy," said Lord Kenyon, "she would have been in perfect safety."

² *Livie v. Jansen*, 12 East, 648.

³ Per Lord Campbell, in *Knight v. Faith*, 15 Q. B. 649, 668, 669; 19 L. J. (Q. B.) 518. Mr. Phillips (vol. i. no. 1136, 1137, 1161, &c.) dissents from the decision thus supported, as being irreconcilable with a rule which he lays down as follows:

"In case of the concurrence of two causes of loss, one at the risk of the assured, and the other insured against; or, one insured against by A. and the other by B., if the damage by the perils respectively can be discriminated, each party must bear his proportion." I submit that in *Livie v. Jansen* there was no concurrence of causes in the sense proper to insurance law, according to which, concurrent causes must be equally immediate to the final loss.

C.J., and the rest of the Court of Common Pleas, held this to be a loss by perils of the sea.¹

*Ionides v.
Universal
Marine Ins.
Assoc.*

An intermediate case, of great interest, arose under a policy on 6000 bags of coffee from Rio Janeiro to New York, warranted free from capture, &c., where the ship, being Federal, went ashore near Cape Hatteras, while that and the adjoining country were in possession of the Confederate forces during the American Civil War. The vessel stranded during a breeze amidst a heavy surge about midnight. Early next morning a rope was sent ashore, and some Confederate officers came on board and made prisoners of the captain and crew, but nothing could be done with the ship or cargo in consequence of the surge all that day. Next day the weather and sea moderated sufficiently to have allowed them to land 1120 bags of the cargo but for a quarrel between the fishermen and soldiers; and in consequence of that only 120 bags were got out. The weather and sea on the third day became so bad again as to prevent working, and the vessel perished with her cargo by the action of the waves. It was held, that the 120 bags landed and taken by the soldiers, and the 1000 bags additional that might have been landed but for the intervention of the soldiers, were together a loss by hostilities within the meaning of the warranty of excepted perils; and that the rest of the cargo, together with the ship, was a total loss by perils of the sea from the moment of stranding, as from that time it never had been in a condition to be the subject of capture.²

*Philpott v.
Swann.*

Under a policy on freight, a ship whilst loading in Hondekliip Bay, with 120 tons of copper ore still to take on board, slipped her cable and stood out to sea in order to escape the effects of a north-west storm; but in doing so she had bent the spindle of her capstan. The captain sailed for St. Helena to get this straightened, and on his arrival,

¹ *Hahn v. Corbett*, 2 Bing. 205. The principle of this case is adopted in the United States. See 3 Kent, Com. 302.

² *Ionides v. The Universal Marine Insur. Assoc.*, 14 C. B. N. S. 259; 32 L. J. (C. P.) 170.

finding that this work could not be done there, he prudently sailed for Swansea, his final port of destination, without the 120 tons of ore. On the basis of these facts a claim for an average loss on freight for the ore not shipped was made, and defeated on the ground that this was not a loss by perils of the sea, or any of the perils insured against. The master prudently went to sea to escape a storm, and through a mistake sought to repair the damage at St. Helena, 1800 miles away, where it could not be done, instead of making for the Cape, only 180 miles off, where it could.¹

Upon the same principle,—*causa proxima non remota spectatur*,—it has been held that the loss on goods sold to defray the expenses of repairing a disabled ship in a port of distress, is not recoverable as a loss by perils of the sea;² or the loss by payment to another ship under an award of half the joint damage done in collision where both ships were in fault.³

But, provided perils of the sea are the proximate cause of loss, the assured is not precluded from recovering under an allegation of such cause, merely because the negligence, unskilfulness, or misconduct of the master and mariners have been the remote occasion.⁴

Where a ship was, by mistake, taken in tow by a British man-of-war, and was obliged, in order to keep up with her, to carry a press of sail in a gale of wind and a heavy sea, by which she shipped a quantity of water and damaged her cargo, Lord Ellenborough held this to be a loss by perils of the sea: though it might also have been alleged to be by

Hagedorn v.
Whitmore.

¹ Philpott v. Swann, 30 L. J. (C. P.) 358; 11 C. B. N. S. 270; S. P., Mordy v. Jones, 4 B. & Cr. 394; Scottish Mar. Ins. Co. v. Turner, 1 Macq. H. of Lds. C. 334.

² Powell v. Gudgeon, 5 M. & Sel. 431; S. P., Sarquy v. Hobson, 4 Bing. 131.

³ De Vaux v. Salvador, 4 A. & E. 420. Seeus in the United States, Peters v. Warren Ins. Co., 3 Sum-

ner's Rep. 389; 3 Kent, Com. 302, note.

⁴ See all the authorities collected in this chapter, *post*, p. 772; and see per Lord Ellenborough in Heyman v. Parish, 2 Camp. 149; and per Gibbs, C. J., in Everth v. Hannam, 2 Marsh. Rep. 74; S. C., 6 Taunt. 375; and per Curiam in Blyth v. Shepherd, 9 M. & W. 763; Davidson v. Burnand, L. R. 4 C. P. 117.

arrest or detention.¹ Damage occasioned to mast, spars, sails, or rigging, by carrying a press of canvas to escape an enemy or lee shore, would, no doubt, be recoverable as a loss by perils of the sea.²

*Montoya v.
London Ass.
Co.*

A ship loaded with hides and tobacco, whilst on her voyage encountered bad weather and shipped much seawater, whereby the hides were wetted and rendered putrid. Neither the tobacco nor the packages containing it were immediately in contact with nor directly damaged by seawater, but the tobacco was damaged by the foetid odour proceeding from the putrid hides. This damage to the tobacco was held to be a loss by perils of the sea.³

Restricted
meaning of
"perils of the
seas."

But the words "perils of the sea," only extend to cover losses really caused by sea damage or the violence of the elements, "*ex marinæ tempestatis discrimine*;" they do not embrace all losses happening upon the seas, such as may be comprehended under the general sweeping words at the end of the clause enumerating the risks insured against, viz., "all other perils, losses, or misfortunes which had or should come to the hurt, detriment, or damage of the said goods and merchandises, ship, or any part thereof." Thus, damage sustained by a ship from the fire of another vessel of the same nation, mistaking her for an enemy, is not, it seems, recoverable as caused by a peril of the sea:⁴ and the damage sustained by a merchantman from the fire of the enemy, would, it is apprehended, be open to the same objection, if so stated;⁵ though both, as we shall presently see, are included under the general words, and would be recoverable under a correct specification of the cause of loss.⁶

In the case of
live stock.

In the case of live stock it is sometimes a very nice question

¹ *Hagedorn v. Whitmore*, 1 Stark. 157.

² *Covington v. Roberts*, 2 B. & P. N. R. 378.

³ *Montoya v. London Ass. Co.*, 6 Exch. 451.

⁴ *Cullen v. Butler*, 5 M. & Sel. 461.

⁵ *Taylor v. Curtis*, 6 Taunt. 608;

2 Marsh. R. 309.

⁶ See *Powell v. Hyde*, 25 L. J. (Q. B.) 65; 5 E. & B. 607.

between loss by mortality (*i. e.*, natural death), and by perils of the sea.

It seems that if living animals be deliberately thrown overboard to save the rest, in consequence of scarcity of provisions occasioned by the gross ignorance of the captain in mistaking his course, and thus protracting the voyage; this will not be properly described as a loss by perils of the sea.¹ So, if they were to perish for want of food, owing to the unavoidable prolongation of the voyage, in consequence of bad and stormy weather, without fault of the captain and crew: this would be a loss by mortality, and not by perils of the sea.²

On the other hand, when a cargo of live stock was so bruised and lacerated by the violent rolling and pitching of the ship in a storm, that they died shortly afterwards on board, in consequence of the injuries thus received, this was held to be a loss by perils of the sea;³ and the Court came to the same conclusion where several horses, in consequence of the labouring of the vessel in a violent storm, broke down the support slings and the partitions, and kicked each other so severely that they died in the course of the storm of the injuries thus received.⁴

Where, however, the loss, whether proximately or not proximately caused by the agency of the winds and waves, is merely the natural result of the action of sea-water on the subject of insurance, or of the ordinary wear and tear of the voyage, or might have been prevented by a proper exertion of care and prudence, it is not recoverable as a peril of the seas, nor indeed under the policy at all.

When the proximate action of the sea not a peril under the policy.

Thus, where the expense of laying down an insufficiently insulated electric cable, is lost through the chemical action

¹ *Gregson v. Gilbert*, 3 Dougl. 232; 2 Marshall, Ins. 493.

² *Tatham v. Hodgson*, 6 T. R. 656; and per Lord Tenterden, 5 B. & Ald. 111. *Accord.* *Taylor v. Dunbar*, L. R.

⁴ C. P. 206, where, in respect of carcasses, putridity set in by reason of

the passage being prolonged by storm and tempest.

³ *Lawrence v. Aberdeen*, 5 B. & Ald. 107.

⁴ *Gabay v. Lloyd*, 3 B. & Cr. 793; S. C., 5 Dowl. & Ryl. 641.

Damage to
the hull by
worms.

of the salt water on the wire, it is not a loss by perils of the sea.¹ Nor is destruction by worms such a loss, at all events in seas where worms ordinarily assail the bottoms of ships, for this is wear and tear of the voyage.² Besides, the assured in such seas ought to secure the ship by metal sheathing against this kind of damage. If, indeed, he have done so, and the sheathing is torn off by the violent action of the perils insured against, in consequence of which the ship's bottom is worm-eaten, it is suggested, Mr. Phillips says, that in such cases the underwriters ought to be liable; unless the loss of the sheathing might and ought to have been repaired before the ship was exposed to the action of the worms.³

Damage by
rats.

On the same ground, the damage by rats to the ship's hull, was held by Lord Ellenborough not to be within the perils insured against by the common form of policy.⁴

Loss by col-
lision.

Loss by *collision* is, generally speaking, a loss by perils of the sea. Lord Stowell thus lays down the law of the Court of Admiralty upon the subject of collision, as it affects the rights and liabilities of owners and masters.

"There are four possibilities under which a loss of this sort may occur. 1. It may happen without blame being imputable to either party; as where a loss is occasioned by a storm or by any other *vis major*: in that case the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree.—2. A misfortune of this kind may arise when both parties are to blame, where there has been a want of due diligence and skill on both sides; in such a case the rule of law is, that the loss must be apportioned between them, as

¹ Paterson v. Harris, 1 B. & S. 336; 30 L. J. (Q. B.) 354.

² Rohl v. Parr, 1 Esp. 444. *S. L.* in United States, Martin v. Salem Ins. Co., 2 Mass. Rep. 429; Hazard v. New England Ins. Co., 8 Peter's

Sup. Court Rep. 557.

³ 1 Phillips, Ins. no. 1101; approved by Chancellor Kent, Com. vol. iii. p. 300, note.

⁴ Hunter v. Potts, 4 Camp. 203; and Laveroni v. Drury, 8 Exch. 116.

having been occasioned by the fault of both.¹—3. It may happen by the misconduct of the suffering party alone; and then the rule is, that the sufferer must bear his own burden.—4. It may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other.”²

Between the maritime law of damage as thus laid down, and the common law on the same head, there used to be this difference, that under the second head of damage the common law awarded no compensation. By the Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 25, sub-s. 9), the Common Law Courts are now required in such cases to follow the rule of the maritime law.

Emerigon, after citing all the learning to be found on the subject in codes and text writers, makes a somewhat similar division, and lays down the following positions with regard to the liability of the underwriters, for losses caused by collision in the different cases just enumerated.³

Liability of
the under-
writer in these
different
cases.

1. That where there is no fault on either side, but the collision is purely fortuitous, the loss is to be made good by the underwriters, as caused by a peril of the sea.⁴

To the same effect, in our own law, it was decided by Lord Kenyon, that damage caused by one ship running foul of another by misfortune and without fault on either side, was

¹ See the principle of this apportioning the loss expounded and illustrated and defended by the Commissioner of Wreck, and formerly Registrar of the Admiralty Division of the High Court. “A Defence of the Rule of the Admiralty Court,” &c., in a Letter to the Right Hon. Lord Selborne, by H. C. Rothery, M.A., Registrar, &c., 1873. The learned author had the satisfaction of knowing that he was thereby the means of preserving this rule in Admiralty cases at the time when the Lord Chancellor’s Bill provided for its extinction, and of extending it to similar cases

before the Courts of Common Law.

² In the *Wardrop-Sims*, 2 Dod. Ad. R. 83, 85.

³ 1 Emerigon, c. xii. s. 14, p. 416. The Code de Commerce (art. 407) has incorporated these distinctions into the text of the modern French law.

⁴ *Xenos v. Fox*, L. R. 3 C. P. 630, was a case in which the assured vessel had run down the other ship, but, as it turned out upon the trial, by accident and without fault. The assured owner did not, under the particular terms of the “running down clause,” recover from the underwriters the expense of defending the action.

a loss "by perils of the sea," within the exception of such losses in a charter-party,¹ and would fall upon the underwriter.

2. Emerigon lays it down, that the underwriter is also liable when the fault rests entirely with the master and crew of the other vessel.

Our law is in this point also the same: thus, where the loss was occasioned by another ship running down the ship insured, owing to the very gross negligence of the crew of the other vessel (who had only one man on deck, and him asleep), this was held a loss by perils of the sea, for which the underwriters were liable under a count so charging it.²

3. Emerigon states that the underwriter is not liable when the collision is entirely owing to the master and crew of the insured ship.

There has been no direct decision in our Courts upon this point. Mr. Marshall conceives that, in such case, the wilful misconduct of the captain or crew would amount to barratry, and the loss, therefore, be recoverable under that head.³ If, however, it did not amount to barratry, the negligence must be of a very gross description in order to exempt the underwriter from his liability.⁴

4. Emerigon then proceeds to lay down, that in cases in which it is impossible to ascertain where the fault really lies, and the whole amount of damage is therefore apportioned equally between the two ships, then the sum which the in-

¹ Buller v. Fisher, 3 Esp. 67.

² Smith v. Scott, 4 Taunt. 126.

³ 2 Marshall, Ins. 495.

⁴ See as to this 2 Phillips, Ins. no. 1417-1420. Mr. Phillips states the law, as derivable from the American decisions, thus:—"Damage to an insured vessel by collision, through the negligence or mistake of the master and crew of such vessel, is according to our prevailing jurisprudence, at the risk of the insurers." From this he dissents (in the 3rd ed.), and states his own view to be, that "underwriters,

under the common form of policy, ought not to be held to indemnify the assured against loss, to which he may be indirectly liable, by reason of his master and mariners negligently or maliciously doing damage to third parties," p. 178, 3rd ed. But the passage has disappeared from the 4th and 5th ed., and with it all dissent. Compare the observations of Parke, B., in Dixon v. Sadler, 5 M. & W. 414, and of Tindal, C. J., *S. C.*, on appeal, 8 M. & W. 898.

sured ship has to pay is a particular average loss, to be made good by the underwriter.¹

Boulay-Paty supports this opinion, on the ground that as the law has declared it impossible to decide which of the two ships was in fault, it is not to be presumed that either was; but the loss must be regarded as a direct result of the perils of the sea,—*i. e.*, of the violent action of the winds and waves, which drove the two ships against one another.² Valin assumes that the underwriter would in such case be liable, but does not particularly examine the question;³ neither does Pothier:⁴ but M. Estrangin, the learned editor of Pothier, investigates it very ably, and concludes “that the damage in such case ought to be regarded as a direct result of the peril of the sea, for which the underwriters on both ships would be liable.”⁵

In this country when the sum of the damage sustained by both ships is equally divided, then any excess over the loss sustained by the insured ship is held not to be recoverable from the underwriter as a loss by perils of the sea.⁶

Opinions of
foreign
jurists.

Law of
England.

Loss by fire, when caused by lightning or the enemy, or resorted to under justifiable circumstances, *e. g.*, to prevent

Loss by fire.
Accidental
fire.

¹ 1 Emerigon, c. xii. s. 14, p. 417.

There is no such rule in English law as sanctions the imputation to A. of the damage sustained by B. on no other ground *sed propter difficultatem probandi culpam*. See this rule of Continental Courts very fully considered, Maclachlan, Shipping, 305, 306 *et seq.*

Questions of considerable nicety have arisen lately in our Courts as to the distribution of damage between two defaulting ships, but the determination of them is likely to rest with the law of shipping without perplexing the liabilities of the underwriter. See Chapman v. Royal

Netherlands Steam Nav. Co., 4 Prob. Div. 157, overruled by the Lords in *Stoomvaart Maatschappij Nederland v. P. & O. Co.*, 7 App. Cas. 795. See *The Hector*, 8 Prob. Div. 218, 221. The principle of the decision in *De Vaux v. Salvador*, 4 A. & E. 420, will continue to govern the liabilities of the underwriter in such cases.

² Boulay-Paty, Comment on Emerigon, vol. i. p. 417, and also 4 Droit Mar. 15.

³ 2 Valin, liv. 3, t. 6, art. 11.

⁴ Pothier, d'Assurance, no. 50.

⁵ Pothier par Estrangin, p. 75.

⁶ *De Vaux v. Salvador*, 4 A. & E.

420.

capture,¹ is clearly a charge upon the underwriter, under the word "Fire," in our common form of policy.²

Fire originating in the cargo.

Loss of the cargo through spontaneous combustion, as it is occasioned by the inherent vice of the goods themselves, does not fall on the underwriters;³ nor does it, if the ignition be the result of the damaged condition of the goods at the time of shipment, as the loss in that case is wholly due to the acts of the assured himself:⁴ but if other goods, in the same hold, not contributing to the cause of loss, or the ship herself be burnt in consequence, the underwriters, it seems, are liable; and so they would be for loss of the cargo in case the ignition should turn out to be the consequence of sea damage received after shipment.⁵

Fire by negligence.

It was for a long time a vexed question, whether the underwriters, under a policy in the common form, were liable for a loss proximately caused by fire, but remotely occasioned by the negligence of the master and crew or other agents of the assured. This question in our law is now settled in the affirmative, supposing the master and crew to have been originally competent.⁶ And, after some fluctuations in the decisions, the law in the United States seems now to be settled in the same way.⁷

Of course, where the form of the policy, as is very general

¹ *Gordon v. Rimmington*, 1 Camp. 122. Emerigon accords, and cites Valin and Pothier to the same effect, provided the crew make their escape; 1 Emerigon, c. xii. s. 17, pp. 431-433. Emerigon (vol. i. p. 429) includes the case of a ship burnt to prevent contagion as an instance of loss by fire within the policy. *Sed quære* whether this would be sustained by English law.

² 1 Emerigon, c. xii. s. 17, p. 428.

³ *Ante*, p. 722.

⁴ *Boyd v. Dubois*, 3 Camp. 133. This defence seems to arise under a denial that the loss was by the perils

insured against. There is no warranty of seaworthiness as to cargo, *Koebel v. Saunders*, 33 L. J. (C. P.) 310.

⁵ See *Montoya v. London Ass. Co.*, 6 Exch. 451.

⁶ *Busk v. Royal Exch. Ass. Co.*, 2 B. & Ald. 73. See per Parke, B., *Dixon v. Sadler*, 5 M. & W. 414, 415; and per Tindal, C. J., *S. C.*, 8 M. & W. 898.

⁷ By the cases of *Patapsco Ins. Co. v. Coulter*, 3 Peter's Sup. Court Rep. 222; *Columbia Ins. Co. v. Lawrence*, 10 ibid. 517; *Waters v. Merchants' Ins. Co.*, 11 ibid. 213; 3 Kent, Com. 303, 304.

on the Continent, excludes the risk of the negligence of the master and crew, or, as in some of the French policies, the barratry of the master (which word barratry, as there understood, extends not only to the wilful and fraudulent, but also to the negligent, acts of the master), loss by fire so occasioned is not chargeable on the underwriters.¹

Loss of rigging, &c., accidentally burnt on a bank saul, stowed there according to a usage in the China trade, is a loss by fire under the common form of policy.²

A policy of insurance in the common form covers the risk of fire at sea in a steamer, just as in any other vessel.³ Where the assured recovered for the loss of their steamer which was wrecked by the explosion of the boiler under very ordinary circumstances, in consequence of the thinness of one of the plates through corrosion or scaling, Lord Esher expressly rests his decision on the term *fire*, having been introduced into the perils clause of the policy, which had the effect of giving a new and extended signification to the general words *ejusdem generis* at the end of that clause, under which words it was that the plaintiff recovered.⁴

Capture, properly so called, is a taking by the enemy as prize, in time of open war, or by way of reprisals, with intent to deprive the owner of all dominion or right of property over the thing taken.⁵

Capture and seizure, or "takings at sea."

It is deemed lawful when made by a declared enemy lawfully commissioned, and according to the laws of war; unlawful when it is made otherwise. Its legality or illegality

By capture lawful or unlawful.

¹ 1 Emerigon, pp. 428, 429; Pothier, d'Assur. no. 53, 65. The general subject of this section is well and succinctly discussed by Boulay-Paty, who, however, draws his learning from the vast stores of Emerigon; see Droit Mar., tom. iv. pp. 20-23.

² Pelly v. Royal Exch. Ass. Co., 1

Burr. 341.

³ Pattison v. Mills, 1 Dow & Clark, 342; 2 Bligh's N. S. 519.

⁴ West India Telegraph Co. v. Home & Col. Ins. Co., 6 Q. B. D. 51.

⁵ 1 Emerigon, c. xii. s. 18, p. 342 et seq.

does not affect the liability of the underwriter; whether lawful or unlawful, he is equally liable.¹ Thus, where the policy was on goods "warranted free of capture or seizure," and the proof was that the ship, a British vessel, had been fired into and sunk by the Russians before the declaration of hostilities between Great Britain and Russia, and the crew were detained for some time: the Court, being of opinion, on the whole of the facts, that the object of the Russians was to detain the ship, held that except for the warranty the underwriters would have been liable, but that the warranty protected them.²

So, the seizure of the ship by certain mutinous Coolie passengers has been held to be within a similar warranty;³ and a piratical seizure of the vessel was held to be a loss by capture within the meaning of the policy.⁴ A British merchantman, when on the coast of Africa, was seized by a British cruiser and carried to St. Helena, where the ship and cargo were condemned as being engaged in the slave trade. This was a mistake in fact, for the decision was on that ground reversed by the Privy Council, and restitution ordered. Yet it was held to be a loss within the policy as a "taking at sea."⁵

Whenever capture is the proximate cause of loss, the assured may recover as on a loss "by capture," though other causes may have been contributory thereto. Thus, even where the capture was concerted between the master of the ship insured and the captor, Lord Ellenborough held that the assured might recover as on a loss by capture, though he might also have recovered on a count for barratry.⁶ So,

¹ Per Lord Mansfield in *Goss v. Withers*, 2 Burr. 683, 694, 695.

² *Powell v. Hyde*, 5 E. & B. 607; 26 L. J. (Q. B.) 65.

³ *Kleinwort v. Shepard*, 1 E. & E. 447; 28 L. J. (Q. B.) 147.

⁴ *Dean v. Hornby*, 3 E. & B. 180; 23 L. J. (Q. B.) 129.

⁵ *Lozano v. Janson*, 2 E. & E. 190; 28 L. J. (Q. B.) 337.

⁶ *Arcangelo v. Thompson*, 2 Camp. 620. Of course the assured must not have been privy to such loss; *Australasian Ins. Co. v. Jackson*, coram P. C., 33 L. T. N. S. 286; *Wilson v. Rankin*, 34 L. J. (Q. B.) 62.

where a ship was driven ashore, with only slight damage, on a hostile coast, and there captured, this was held to be a loss by capture, and not by perils of the sea.¹

As we shall see more at large hereafter, in treating of abandonment, capture is *prima facie* a case of total loss. If the assured give notice of abandonment, and the underwriter accept the abandonment, the rights of the parties are thereby fixed. Otherwise, the right of the assured to recover for a total loss is contingent on the ship not being restored before action brought; for, if it be restored before action, the assured will recover in proportion to the actual damage done; if not, then the whole sum insured, as for a total loss.

Capture is, generally speaking, a constructive total loss.

It has long, however, been the established rule of our law maritime, that there is no change of property by capture till there has been a regular sentence of condemnation;² and the condemnation, in order to be legal, must be pronounced by a Prize Court of the government of the captor, sitting either in the country of the captor or of his belligerent ally. The Prize Court of an ally cannot condemn, nor can a Prize Court of the captor lawfully act as such in a neutral territory.³ The Prize Court of a captor sitting in the country of his own sovereign, or of an ally, has no jurisdiction over prizes carried into neutral ports, and remaining there at the time of passing sentence.⁴

Condemnation when valid.

Apart from all questions as to abandonment, which will be considered elsewhere, the underwriter is liable for any damage the ship may have actually sustained, and also for all necessary expenses, such as salvage, &c., which the assured has been put to for the recovery of his property,—for instance, for a sum of money paid by the neutral assured to

¹ *Green v. Elmalie*, Peake, 212; *Livie v. Jansen*, 12 East, 648.

² See 2 Marshall, Ins. 803, where all the authorities are collected.

³ *The Flad Oyen*, 1 C. Rob. Ad. R. 135; *Havelock v. Rockwood*, 8 T. R. 268; *Oddy v. Bovill*, 2 East, 473;

Answer to the Prussian Memorial of 1753, given in *Maclachlan, Shipping*, 547 *et seq.*

⁴ See this question examined, ante, p. 640, and *Maclachlan, Shipping*, 21 *et seq.*

belligerent captors, as a compromise *bonâ fide* made to prevent the ship from being condemned as prize.¹

Ransom.

Formerly it was a common practice to ransom British ships when captured by the enemy, by delivering to the captor what was called a ransom bill.² The Legislature, in 1781, wholly abolished this practice, by declaring all ransom by British subjects of ships or goods taken by the enemy as prize to be illegal.³ Money paid for such a purpose, therefore, is not recoverable from the underwriters—not if the capture and condemnation be in accordance with the law of nations—*a fortiori* not, if the condemnation be illegal.⁴

Risk of British capture.

We have seen elsewhere that the risk of British capture is not covered by policies effected during war time with British underwriters⁵ or by a policy effected before the commencement of hostilities,⁶ although the action is not brought till after their termination.⁷

Prizes made after peace.

As the conclusion of a peace following on a general maritime war that has raged at the same time in many different parts of the globe cannot be expected to put an end to hostilities in all parts simultaneously, stipulations are generally inserted in the treaty specifying a time, varying according to distance, after which all prizes made shall be restored.⁸ If, however, it can be shown that the captor was, in fact, aware of the peace having been proclaimed when he made the

¹ *Berens v. Rucker*, 1 W. Bl. 313.

² For the general law maritime as to ransom, see 1 Emerigon, c. xii. s. 21, pp. 463–480. For the modern law of France on the subject, see Co. de Comm. art. 395, 396; Estrangin on Pothier, d'Assur. no. 133, 136, 137; Boulay-Paty, Droit Mar. tom. ii. p. 457 *et seq.*, and tom. iv. p. 420 *et seq.*

³ The first Ransom Act is the 22 Geo. 3, c. 25. This Act, having no

clause of limitation, is perpetual.

⁴ *Havelock v. Rockwood*, 8 T. R. 268; *Parsons v. Scott*, 2 Taunt. 363.

⁵ *Kellner v. Le Mesurier*, 4 East, 396; *Brandon v. Curling*, *ibid.* 410. See ante, p. 132.

⁶ *Furtado v. Rogers*, 3 B. & P. 191.

⁷ *Gamba v. Le Mesurier*, 4 East, 407.

⁸ Emerigon, c. xii. s. 19, p. 452.

prize, such prize, though made before the expiration of the time limited in the treaty, ought to be restored.¹

By the terms of our common policies, the underwriter is answerable for all losses occasioned by "arrests, restraints, and detentions of all kings, princes, and people of what nation, condition, or quality soever."

Arrests, detentions, and embargoes.

By the word "people" is meant, not mobs or multitudes of men, but the ruling power of the country, whatever that may be.²

"People."

An "arrest" takes place whenever the government of the country to which a ship belongs, or any other friendly power, with the design not to make prize (for then it would be a capture), but to restore the ship and goods, or pay the value of them to their owners, seizes ship and goods for state purposes either in port or at sea.³ Thus, where a Genoese corn ship was seized at sea by Venetian cruisers, and carried in for the relief of Corfu, then in a state of famine, where it was sold and paid for, it was decided by the rota of Genoa that this was not a capture, in respect of which the assured, who had abandoned, could recover for a total loss, but merely an arrest, or detention of princes, the object being not to make prize, but to purchase corn.⁴

Arrests as distinct from capture.

In this lies the grand distinction between arrest and capture. Capture is, as we have seen, the forcible taking of a

¹ Emerigon, *ut supra*. Lord Stowell affirmed the legality of a capture made after signature of a treaty of peace and before ratification; *The Eliza Ann*, 1 Dods. Ad. R. 244. As to the case of *Spencer v. Franco*, in the time of Lord Hardwicke, cited from Beawes, 316, by Lord Mansfield *alio intuitu* in *Hamilton v. Mendes*, 2 Burr. 1211, see note by Marshall (Ins. 517), showing that it is not reliable.

² *Nesbitt v. Lushington*, 4 T. R.

783.

³ The definition of Boulay-Paty seems concise and accurate: "L'arrêt de prince est l'acte d'un prince ami, qui pour nécessité publique, et hors le fait de la guerre, arrête quelque vaisseau ou tous les vaisseaux qui se trouvent dans un port ou rade de ses dominions." *Droit Comm. Mar.*, tom. iv. p. 36. See *Aubert v. Gray*, 3 B. & S. 163, 169.

⁴ *Roccus*, not. 60, cited 1 Emerigon, c. xii. s. 30, p. 527.

ship, &c., in time of war, with a view to appropriating it as prize. Arrest is a temporary detention of the ship, &c., with a view to ultimately releasing it, or paying its value.¹

When detention resembles capture.

Hence the detention of ships in port after declaration of war against the country to which they belong, or by way of reprisals, rather resembles a capture than an arrest.² So, where a neutral ship is arrested at sea by a belligerent cruiser, and, under suspicion of having enemy's goods on board, is carried for search and adjudication into a hostile port, as the result may be the condemnation of ship and cargo, but more especially as the act is done in time of war, and as a warlike measure, this is rather to be esteemed a capture than a simple arrest.³

Goods shipped at Shanghai for London *via* Marseilles and Paris, had arrived in Paris on the 13th of September, 1870, and on the 19th were still there when the German forces surrounded Paris and prevented their being forwarded; this was held to be a loss within those terms of the policy "arrests, restraints, and detainments of princes, &c."⁴

Embargoes.

Embargoes are the most common cases of "arrests, restraints, and detainments" of princes. An embargo is an order of government (generally, but not always, issued in contemplation of hostilities), prohibiting the departure of ship or goods from some or all of the ports within its dominions.⁵

When it is upon the subjects of the government imposing.

An embargo laid by a foreign government upon the ships or goods of any other than its own subjects, entitles the assured at once to give notice of abandonment, and, if the embargo continues down to the time of action brought, to recover as for a total loss. Thus, where a neutral ship and stores, insured "at and from" an enemy's port, were there

¹ 1 Emerigon, *quâ supra*.

² Ibid., and see 2 Marsh. Ins. 509.

So it was received in the recent case of Fowler v. The English and Scotch Marine Ins. Co., 34 L. J. (C. P.) 207.

³ Barker v. Blakes, 9 East, 283; and see 2 Marshall on Ins. 510; 1 Emerigon, c. xii. s. 30, p. 523.

⁴ Rodocanachi v. Elliott, L. R. 8 C. P. 649.

⁵ 1 Emerigon, c. xii. s. 30, p. 526.

detained by an embargo laid on by the enemy in the port of loading, and continued down to the time of action brought, the assured recovered as for a total loss, under a count for loss by "arrests and restraint of princes."¹

This also is the law of our Courts in case of embargo by a foreign government laid upon the ships of its own subjects, being at the time at peace with this country, and doing this without any view to us. A cargo insured in this country, but belonging to a Spanish subject, and loaded on board a Spanish ship, was detained and unloaded at Corunna by the Spanish government, for the purpose of converting the ship into a transport of war during the hostilities of Spain with Morocco. This was held by the Exchequer Chamber to be a loss for which the underwriters were liable.²

There appears to be no doubt that if a British ship be arrested or seized by the British Government, from any state necessity, or detained in port by a British-laid embargo, this is a loss for which the underwriters are liable as a detention within the meaning of the policy.³ Such, accordingly, seems to have been the opinion of our Courts in a case where a British ship was seized by the British Government and converted into a fire-ship,⁴ and in another, where such ship was seized and taken in tow by a British man-of-war.⁵

In fact, there seems no ground of distinction in this respect, Foreign law. as far as concerns the liability of the underwriters, between an arrest or embargo by the home and by a foreign government. Accordingly, the modern French Code de Commerce has decreed that "arrest by the home government after the

¹ *Rotch v. Edie*, 6 T. R. 413.

² *Aubert v. Gray*, 3 B. & S. 163, 169; 32 L. J. (Q. B.) 50; overruling *Conway v. Gray, &c.*, 10 East, 536, and *Campbell v. Innes*, 4 B. & Ald. 423. See *Simeon v. Bazett*, 2 M. & Sel. 94, and *Bazett v. Meyer, S. C.*, in error, 6 Taunt. 824; and ante,

p. 738.

³ Dictum of Lord Alvanley in *Touteng v. Hubbard*, 3 B. & P. 291, 302.

⁴ *Green v. Young*, 2 Lord Raym. 840; Salk. 444.

⁵ *Hagedorn v. Whitmore*, 1 Stark. 157.

commencement of the voyage," is a ground of abandonment;¹ and the later French jurists, especially Boulay-Paty² and Estrangin,³ show that it rests on precisely the same ground as an arrest by foreign powers.

Difference by
the language
of the policy.

In French law the risk on the ship does not commence until she has sailed on the voyage, and accordingly the language of the Code is, that abandonment may be made on account of an arrest by the home government after, but not before, the commencement of the voyage.⁴

In our law under policies "at and from" a port, the risk on the ship commences while she is at the port, whether undergoing repairs, or otherwise preparing for the voyage insured; and there seems no doubt that if a ship thus insured were arrested or detained by our government in her port of loading, whether with or without her cargo on board, although before she had broken ground for the voyage, the underwriter would be liable as for a loss by arrest or detention under such a policy.⁵

A question has been raised, whether, in case goods are seized by a friendly power, or by the home government for state necessities, as in the case of provisions already mentioned, the assured can recover as for a loss by arrest and detention;⁶ I have no doubt that in point of strict law the assured is entitled to recover as for a total loss, deducting, however, the money paid him by the arresting government from the amount of his claim under the policy.

Wages and
provisions
during deten-
tion.

An arrest, detention, or embargo, does not, like a capture, break up the voyage under the charterparty, or at once put an end to a contract of affreightment; on the contrary the

¹ Art. 369, 370.

² 4 Boulay-Paty, *Droit Com. Mar.* 36-44, and 237-240.

³ Estrangin on Pothier, no. 59, pp. 94, 95.

⁴ Co. de Com. art. 369, 370; 1 Emerigon, c. xii. ss. 30, 528; Pothier, d'Assur. no. 59.

⁵ Green v. Young, Salk. 444;

Rotch v. Edie, 6 T. R. 413.

⁶ Valin, liv. 3, t. 6, art. 49, p. 127; Pothier, no. 57, as cited and commented upon with various other authorities by Emerigon, c. xii. s. 33, vol. i. pp. 543-545. And see Aubert v. Gray, 2 B. & S. 163, 169; 32 L. J. (Q. B.) 50.

voyage is still supposed to be proceeding on its former terms, the period of detention being considered as a portion of it.¹ Hence wages and provisions of the crew, during a detention by embargo, are not chargeable, by our law, upon the underwriter on ship, as they form part of those ordinary and usual expenses of the navigation which fall exclusively upon the shipowner, and for which he is remunerated out of the freight.² The principle is, that the shipowner, in consideration of the freight, owes the services of the crew to the freighter during the whole voyage, and consequently also during the time of detention, which is considered to make part of it.³

In France the Code de Commerce provides that the wages and provisions of the sailors during a detention of princees shall be particular average, when the ship is chartered for the entire voyage;⁴ general average when the ship is hired at so much per month.⁵ The reason being that as in the latter case the owner receives no freight for the time during which the ship is detained, he does not owe the services of his crew during such time to the freighters, and his providing such services is, therefore, an extraordinary expenditure for the general benefit. French law.

Amongst the perils which the underwriters avowedly take upon themselves in our common printed forms of policy, are those of "pirates, rovers, and thieves;"—*first, of pirates and rovers.* Loss by pirates, rovers, and thieves.

Loss thus incurred was formerly included in our maritime law amongst the general perils of the seas,⁶ and probably Pirates.

¹ MacLachlan, Shipping, 553.

⁵ Art. 400, s. 6.

² Eden v. Poole, 1 Park, Ins. 117;
² Marshall, Ins. 730; Robertson v. Ewer, 1 T. R. 127.

⁶ 2 Roll. Abr. 248, pl. 10, Comber. 56, cited 1 Park, Ins. 137. The foreign law is to the same effect. Santerna de Assec., part 3, nos. 61-65; Straccha, Glos. 22, cited 3 Kent, Com. 303, note. See Dean v. Hornby, 3 E. & B. 180,

³ Benecke, Pr. of Indem. 462; Pothier, des Charte-Parties, no. 85, cited 1 Emerigon, 529.

⁴ Art. 403, s. 4.

would still be held to be so; though, as piracy is one of the enumerated perils, the point is of less importance.

Where a meal mob on the coast of Ireland violently boarded a corn-laden ship, suffered her to run on a reef of rocks, and then forced the captain to sell the corn at a low price; Lord Kenyon held this a loss by pirates.¹

Loss by crew
or passengers.

Under the risk of pirates and rovers, the underwriters are, it seems, liable for a mutinous seizure, and carrying away of the ship by the crew;² but more properly, it is a loss by barratry.³ Where certain Coolie emigrants on a voyage from Canton to Callao, piratically and feloniously murdered the captain and part of the crew, and forcibly carried away the ship and the rest of the crew, this was held an act of piracy, or, at all events, an act *ejusdem generis*, and covered by the policy.⁴

Thieves.

Secondly, of thieves.—The theft that is insured against by name in the policy, means that which is accompanied by violence (*latrocinium*), and not simple theft (*furtum*); it being an old and elementary rule of the law of insurance, that, *furtum non est casus fortuitus*, is not one of the fortuitous events against which the owner may seek indemnity by insurance, but one which the law presumes might have been prevented by the exercise of due vigilance.⁵

Robbery.

Robbery, accompanied by violence, and committed by strangers, not by the crew, is a loss for which the underwriters on the ship or goods are liable as a loss by rovers or thieves under the policy; the maxim being, that *latrocinium fatale damnum seu casus fortuitus est*.⁶

¹ *Nesbitt v. Lushington*, 4 T. R. 783.

² *Brown v. Smith*, 1 Dow. P. C. 349.

³ *Dixon v. Reid*, 5 B. & Ald. 597.

⁴ *Naylor v. Palmer*, 8 Exch. Rep. 739, affirmed in error, 10 Exch. Rep. 382; 22 L. J. (Exch.) 329; 23 L. J. (Exch.) 323. See *Kleinwort v. Shepard*, 28 L. J. (Q. B.) 147; 1 E. & E. 447, where similar facts were held to

be within a warranty—*free from capture and seizure*.

⁵ See also the learning on this subject collected and lucidly arranged by Emerigon, c. xii. s. 29, *Vol des Effets assurés*, vol. i. p. 524.

⁶ *Roccus*, not. 43, cited 1 Emerigon, c. xii. s. 29. So held in English law, *Harford v. Maynard*, before Lord Mansfield, cited 1 Park, Ins. 36.

It has, however, been decided by Chancellor Walworth, In the United States. in the State of New York, that, under the general word "thieves," in the common form of policy, the assured on ship or goods may recover even for a simple theft committed on the voyage by persons belonging to the ship.¹ Chancellor Kent, however, in a note rich with his usual variety of learning and pregnant accuracy of expression, shows that this doctrine not only overrules all the old authorities and text books, but it is very questionable policy when applied to the owner of the ship.² In this country it cannot be considered law. To obviate all doubt as to the construction of the word "thieves," the printed forms of the Boston policy, instead of "pirates, rovers, and thieves," contain the words, "pirates and assailing thieves."³

If shipwrecked goods are plundered by wreckers on shore, Plunder by wreckers. this is held by Emerigon and Pothier, and has been decided in this country, to be a loss for which the assured on goods may recover under a count for loss by perils of the sea.⁴

The same law has been applied to charges levied on cargo by a foreign power, into whose hands it had been cast by perils of the sea.⁵

Losses that are attributable to any of the perils insured against, though occasioned by the negligence or misconduct of the agents of the assured, not amounting in the latter to barratry, are covered by an ordinary policy. "We are all of opinion," said Lord Tenterden, "that underwriters are Losses through the negligence of the agents of the assured.

¹ Atlantic Ins. Co. v. Storrow, 5 Paige, 293; affirmed in American Ins. Co. v. Bryan, 26 Wend. 563, in the Sup. C. of New York, and this case was affirmed in error. The former of these cases was that of a theft without violence from the vessel while she lay at the wharf; the latter, that of a theft while on the voyage. Mr. Phillips appears to accept this as the prevailing law of the United States

when the word *assailing* is not in the policy; 1 Phillips, no. 1106. Accord. 1; Parsons, Ins. 564.

² 3 Kent, Com. 303, note.

³ Form of Boston policy, Vaucher, 44.

⁴ 1 Emerigon, c. xii. s. 29, citing Pothier, d'Assurance, no. 55; Bondrett v. Hentigg, Holt, 149.

⁵ Dent v. Smith, L. R. 4 Q. B. 414.

responsible for the misconduct and negligence of the captain and crew; but the owner, as a condition precedent, is bound to provide a crew of competent skill.”¹ This is the law of England,² and seems at length to be the law of the United States.³

*Busk v. Royal
Exch. Ass.
Co.*

A Russian ship, seaworthy at the outset of the risk, being compelled to winter in the Gulf of Finland, under charge of the mate, was, owing to his negligence in not extinguishing a fire which he had lighted in her cabin, burnt while he was absent on board another vessel; the Court held, that as the loss of the ship was proximately caused by fire (one of the perils insured against), the underwriters were liable, though it was remotely occasioned by the negligence of the mate.⁴

*Walker v.
Maitland.*

The Court came to the same conclusion in a case where sugars were lost in the course of being conveyed from the ship to shore according to the usage of the West India trade, in a sloop adequately manned for the purpose, which was drifted on the rocks in consequence of the seamen in charge of her all going to sleep, in gross neglect of their duty.⁵

*Holdsworth v.
Wise.*

A ship insured out and home, having been seaworthy at the outset, was lost on her passage home by the perils of the sea; the underwriters were held not to be discharged by the captain's negligence and misconduct in sailing with her on

¹ *Shore v. Bentall*, 7 B. & C. 798 n.

² *Busk v. Royal Exch. Ass. Co.*, 2 B. & Ald. 73; *Walker v. Maitland*, 5 B. & Ald. 171; *Bishop v. Pentland*, 7 B. & Cr. 219; *Holdsworth v. Wise*, *ibid.* 794; *Shore v. Bentall*, *ibid.* 798; *Phillips v. Headlam*, 2 B. & Ald. 380; *Dixon v. Sadler*, 5 M. & W. 405; *S. C.*, confirmed in error, 8 M. & W. 895; *Redman v. Wilson*, 14 M. & W. 476; *Davidson v. Burnand*, L. R. 4 C. P. 117; per Lord Esher, *West India Telegraph Co. v. Home & Col. Ins. Co.*, 6 Q. B. D. 51, 61.

³ See 1 Phillips, *Ins.* chap. xiii. s. 2; 3 Kent, *Com.* 304, 306. The cases in the Supreme Court of the United States, which seem to have fixed the law as stated in the text, are: *Patapsco Ins. Co. v. Coulter*, 3 Peter, R. 222; *Columbian Ins. Co. v. Lawrence*, 10 Peter, R. 517; *Waters v. Merchants Ins. Co.*, 11 Peter, R. 213.

⁴ *Busk v. Royal Exch. Ass. Co.*, 2 B. & Ald. 73.

⁵ *Walker v. Maitland*, 5 B. & Ald. 171.

this homeward passage in such a state of leakiness that she had to be pumped out by the crew every two hours.¹

A ship engaged in the African teak trade, and insured out and home, had been seaworthy on setting sail, but at Sierra Leone had been so unskilfully loaded by the native lumpers that she was found unable to keep the sea, and was run ashore in order to prevent her sinking in the Sierra Leone river: the Court, upon the same principle as in the above decisions, held the underwriter liable for this loss.²

Redman v. Wilson.

Damage to cargo by sea water through the waste pipe which had been negligently left open by the crew whilst the vessel was loading in port was held a loss for which the underwriters were liable.³

By these and other authorities referred to in a previous note, the doctrine they support is so firmly established that any dicta of the judges in earlier cases to the contrary must be considered as overruled.⁴

Of course, if it can be shown, in the case of a voyage policy, that the master when appointed was wholly incompetent,⁵ that the crew were insufficient,⁶ or the ship in any way unseaworthy at the outset of the risk, this is matter of defence, of which the underwriter may avail himself under plea of unseaworthiness. In the case of a time policy, as we have seen,⁷ this defence is not open to the insurers,⁸ although but for the unseaworthiness the loss would not have happened.

Scuse, if ship originally unseaworthy.

¹ *Holdsworth v. Wise*, 7 B. & Cr 794; *Shore v. Bentall*, *ibid.* 798, *in notis.*

² *Redman v. Wilson*, 14 M. & W. 476. See also *Hodgson v. Malcolm*, 2 B. & P. N. R. 336; *Carruthers v. Sydebotham*, 4 M. & Sel. 77.

³ *Davidson v. Burnand*, L. R. 4 C. P. 117; the view of this case given in the text is covered by the judgment. See *Good v. London Steamship Owners Mutual Protection Association*, L. R. 6 C. P. 563.

⁴ Such is the judgment of Lord

Kenyon in *Buller v. Fisher*, 3 Esp. 67, and of Mansfield, C. J., in *Hodgson v. Malcolm*, 2 B. & P. N. R. 339.

⁵ *Tait v. Levi*, 14 East, 481; see also *Gregson v. Gilbert*, 3 Dougl. 232; 1 Park, Ins. 138.

⁶ *Forshaw v. Chabert*, 3 B. & B. 158.

⁷ Ante, p. 660.

⁸ See, in addition to cases formerly mentioned, *Dudgeon v. Pembroke*, 2 App. Cas. 284; *West India Telegraph Co. v. Home and Col. Ins. Co.*, 6 Q. B. D. 51.

Loss by barratry.

Former opinion.

As *barratry of master and mariners* is one of the perils insured against in our common printed forms of policy, the first question is as to the meaning attached to the word *Barratry* in English law. Guided by the etymology of the word, which seems ultimately to have been derived from the Catalan *barat*,¹ and proximately from the Italian *barratria*,² in both of which languages it conveyed the notion of fraud or trick, our judges for a long time seem to have considered that fraud or criminal knavery on the part of the master as against the owners, with a view to benefiting himself at their expense, was an essential ingredient in barratry as one of the perils in English policies.³

Lord Ellenborough, however, in an elaborate judgment, reviewing all the preceding authorities, established the position that trick or knavery in the sense of an imposition practised upon the owners by the master, with a view to his own benefit at their expense, was not essential to constitute barratry in our law; but that any wilful act of known criminality or gross malversation, though not intended to the owners' prejudice, nay, even though intended for their benefit, would yet, if in fact it operated to their prejudice by causing the loss or seizure of the ship, be barratry in the master.⁴

¹ 1 Emerigon, c. xii. s. 3, p. 365.

² Per Lord Mansfield, in *Vallejo v. Wheeler*, Cowp. 154.

³ Thus, in the earliest English case on the subject, *Knight v. Cambridge*, 8 Mod. Rep. 231 (cited 8 East, 135), the Court considered fraud to be the substantial matter constituting barratry. So Lee, C.J., said, "to make barratry it must be something of a criminal nature;" *Stamma v. Brown*, 2 Str. 1173. "Barratry," said Lord Mansfield, "must partake of something criminal, and must be committed against the owner by the

master and mariners;" *Nutt v. Bourdieu*, 1 T. R. 330. "Whatever is by the master a cheat, a fraud, a cozening, or a trick, is barratry;" *Vallejo v. Wheeler*, Cowp. 154. "Barratry," says Aston, J., in the case last cited, "comprehends every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured;" *ibid.* 155. See also the dicta of Willes, J., in *Lockyer v. Offley*, 1 T. R. 252.

⁴ *Earle v. Rowcroft*, 8 East, 126; *Heyman v. Pariah*, 2 Camp. 149.

Barratry, then, in English law, may be said to comprehend not only every species of fraud and knavery covinously committed by the master with the intention of benefiting himself at the expense of his owners, but every wilful act on his part of known illegality, gross malversation, or criminal negligence by whatever motive induced, whereby the owners or the charterers of the ship (in cases where the latter are considered owners *pro tempore*) are, in fact, damnified.¹

Definition of
barratry.

With regard to intent, some acts are such in kind and nature as to appear branded on the outside with the intent of the doer. As, for instance, in the case of illegal trading with the enemy, or cutting the ship's cable so as to let her drift upon the rocks, no proof, in order to show the act barratrous, need be given of the master's having acted with a fraudulent intent to injure his owners; nay, even if it can be shown, as in the case of trading with the enemy, that it was done with a view to the owner's benefit, yet, if against, or not in consequence of, his instructions, it is still barratry.

Intent.

On the other hand, where the act itself, as in cases of deviation, is not thus, on the face of it, criminal or fraudulent, proof must be given of a fraudulent or criminal intent on the part of the master either secretly to benefit himself, or to injure his owners, before such act can be adjudged barratrous.²

Proof of in-
tent.

It must also be carefully borne in mind that, in the absence of fraud, nothing but acts of known criminality, gross malversation, or negligence so gross as to be clearly fraudulent and criminal, can amount to barratry. Loss arising from the ignorance or incompetence of the captain, from a mistake as to the meaning of his instructions, or misapprehension of the best mode of carrying them into effect, can never amount to

What is not
barratry.

¹ The tersest and (perhaps) best definition of barratry is that given by Lord Hardwicke in *Lewin v. Suasso* (Postlethwaite's Dict. 177, tit. Assurance), viz., that it is "an act of wrong

done by the master against the ship and goods."

² See the concluding observations of Lord Ellenborough in *Earle v. Rowcroft*, 8 East, 126, 139.

barratry. The master, in fact, before he can be proved to have acted barratrously, must be shown to have acted against his better judgment; if he merely acted up to the best of his judgment, however bad, it is not barratry.¹

Thus, where the captain of a sea-damaged ship, before survey, broke up her ceiling and end-bows with crow-bars and thereby injured her, but no proof was given of his having been actuated by any criminal intent in so doing, Lord Ellenborough said—"To constitute barratry, which is a crime, the captain must be proved to have acted against his better judgment; as the case stands there is a whole ocean between you and barratry."²

Another principle, clearly flowing from the true notion of barratry as a criminal act committed by the master against the interest of the owners (whether fraudulently or not), is, that no act can be barratrous in respect of any assenting owner; for no man can take advantage or complain of his own wrong.³

Cases of loss
by barratry.

Having thus indicated the leading principles by which to determine whether a loss is barratrous or not, we proceed to examine what has been held in practice to amount to barratry.

Sailing with-
out paying
port dues, or
in breach of
an embargo.

In the earliest case, sailing out of port without paying port dues, whereby the ship and goods were subjected to forfeiture, was held barratry;⁴ and so sailing out of port without leave, in breach of an embargo, in consequence of which the owners afterwards sustained a loss, in respect of seamen's wages and provisions, by the detention of the ship, was

¹ *Phyn v. Royal Exch. Ass. Co.*, 7 T. R. 605; *Todd v. Ritchie*, 1 Stark. 240; *Bottomley v. Bovill*, 5 B. & Cr. 212.

² Per Lord Ellenborough in *Todd v. Ritchie*, 1 Stark. 240.

³ See *Stamma v. Brown*, 2 Str. 1173; *Pipon v. Cole*, 1 Camp. 434. Yet by a part-owner, acting as master,

against this innocent co-owner barratry is possible, *Jones v. Nicholson*, 10 Exch. 28.

⁴ *Knight v. Cambridge*, as cited by Lee, C. J., in *Stamma v. Brown*, 2 Str. 1174, and by Lord Ellenborough in *Earle v. Rowcroft*, 8 East, 126, 135, 136.

ruled by Buller, J., and not denied by the full Court, to be barratry.¹

Intentional breach of blockade, by sailing towards, into, or out of a blockaded port, without the knowledge or consent of the owners, though it be with a view to their benefit, is barratry.² But this cannot be maintained if the evidence be quite consistent with the supposition that the captain acted either ignorantly or in obedience to orders from his owners.³

Wilful breach of blockade.

It is held in the United States, seemingly within the scope of sound principle, that the loss of a neutral vessel, consequent either upon a wilful resistance to the right of search, or an attempt to rescue her when rightfully detained and sent in for examination by a belligerent cruiser, is a loss by barratry.⁴

Resistance to right of search or attempt at rescue.

Illegal trading, when the cause of confiscation, if knowingly carried on without the directions, though principally for the benefit of the owners, is barratry.

Illegal trading.

In 1804, while England was at war with Holland, an English ship insured for a slaving voyage from Liverpool to the African coast, and not finding a good market in the British settlements there, put into D'Elmina, a Dutch fort, where the master knew it was illegal for him to enter, and exchanged his cargo for slaves. This being without the privity of his owners, and resulting in confiscation, was held by Lord Ellenborough to be barratry.⁵

If a master with knowledge of the Kidnapping Act, 35 &

¹ *Robertson v. Ewer*, 1 T. R. 127, cited by Lord Ellenborough in *Earle v. Rowcroft*, 8 East, 126, 139.

² *Goldschmidt v. Whitmore*, 3 Taunt. 508.

³ *Everth v. Hannam*, 6 Taunt. 375; 2 Marsh. R. 72, S. C. The American authorities are collected by Mr. Phillips, vol. i. nos. 1067, 1068.

⁴ *Dederer v. Delaware Ins. Co.*, 2 Wash. C. C. Rep. 61; *Willcocks v. Union Ins. Co.*, 2 Binney's Rep. 579,

cited 1 Phillips, no. 1068. A recognition of the principle contained in these cases is attributed to Buller, J., in *Saloucci v. Johnson*, 2 Park, Ins. 758, cited 8 East, 129; and see *Garrels v. Kensington*, 8 T. R. 230, where no count was inserted for loss by barratry—a circumstance significantly remarked by Lawrence, J., p. 235.

⁵ *Earle v. Rowcroft*, 8 East, 126.

36 Vict. c. 19, prohibiting the carrying of Polynesian labourers in ships without a licence, ship such labourers without a licence and without the consent of his owners, and thereby occasion the seizure and condemnation of the vessel, this is barratry.¹

Cruising.

Upon the same principle it is barratry if a merchantman cruise contrary to the intentions and instructions of the owners, the ship while so cruising being driven ashore in a storm, and the cargo lost.²

Smuggling.

Smuggling in fraud of the owners is barratry, and they are entitled to recover, notwithstanding the ship is only insured "on any lawful trade;" for these words mean the trade in which the ship is employed by her owners, and not any unlawful commerce in which the captain may barratrously engage without their concurrence.³ But there may be such gross negligence on the part of the owners as, though short of guilty connivance, yet deprives them of the assistance of the law against the consequences. Thus, where a ship had three times been seized after three successive trips, for three distinct acts of smuggling by the crew, the owner was not allowed to recover the third time.⁴

Aliter, in case of gross negligence of owners.

Mutinously carrying the ship out of her course.

If the ship is violently carried out of her course, and fraudulently run away with by the captain and crew, this is barratry, from the moment of the wilful deviation.⁵ So is purposely running the ship on shore, without justifying necessity;⁶ or fraudulently procuring the ship to be condemned and sold. In this latter instance the act of barratry (as a "cause of action," under the Statute of Limitations) dates, not from the period at which the master abandoned the voyage, or even from the condemnation of the ship, but from the completion of the transaction by her delivery and sale.⁷

¹ *Australasian Ins. Co. v. Jackson*,
coram P. C., 33 L. T. N. S. 286.

² *Moss v. Byrom*, 6 T. R. 379.

³ *Havelock v. Hancill*, 3 T. R. 277.

⁴ *Pipon v. Cole*, 1 Camp. 434.

⁵ *Falkner v. Ritchie*, 2 M. & Sel.

290; *Brown v. Smith*, 1 Dow, P. C.
349; *Dixon v. Reid*, 5 B. & Ald. 597;
1 D. & Ryl. 207.

⁶ *Soares v. Thornton*, 7 Taunt. 628;

1 Moore, 373, *S. C.*

⁷ *Hibbert v. Martin*, 1 Camp. 538.

So far of acts which were manifestly criminal and fraudulent, and to the prejudice of the owners: but in the absence of covinous fraud, misconduct amounting to gross malversation by the master in his office, if it be to the prejudice of his owners, is barratry.

Misconduct of the master, though not fraudulent.

A pilot swore that the captain, who had before refused to sail when the wind was fair, persisted in doing so, contrary to his directions, when it was unfavourable; and still disregarding the pilot's instructions, cut the cable, so that the ship drifted on the rocks; and Lord Ellenborough held, that this, if true, would amount to barratry.¹

Nonfeasance may under certain circumstances be as grossly wicked as a direct act of malevolence. Thus, if a master sees another in the act of scuttling or firing the ship, and will not rise from his berth to prevent it, he is, *prima facie*, chargeable with barratry; for it is a breach of trust and duty, an act of infidelity to his owners.²

Nonfeasance in extreme cases.

But, short of this criminal degree of negligence, no loss occasioned by the mere ignorance, incompetence, or carelessness of the master can constitute an act of barratry. Thus "unless accompanied with fraud or crime, no case of deviation will fall within the true definition of barratry."³

Not so, gross ignorance, apart from fraud.

A captain, whose instructions were to proceed immediately from London to Jamaica, having been carried by currents out of his reckoning to a point between the Grand Canary and Teneriffe, whence his direct course to Jamaica was south-west, instead of taking that, bore up north-west to Santa Cruz, which was then in sight, where his ship was laid under embargo and condemned as prize. The jury having found that this deviation was not fraudulent, the Court held it not barratrous. Lawrence, J., said, "That he knew of no case in

¹ Heyman v. Parish, 2 Camp. 149.

¹ Phillips, Ins. no. 1074.

² Per Johnson, J., in the American case of Patapasco Ins. Co. v. Coulter, 3 Peter's Sup. Court Rep. 222, cited

³ Per Lord Ellenborough, in Earle v. Rowcroft, 8 East, 126, 130.

which it is said that the act of the captain is barratrous merely because it is against the interest of the owners; it must be done with a criminal intent; the jury here, having negatived fraud, had negatived criminality; therefore this was not a barratrous deviation."¹ So, taking an intermediate voyage contrary to the instructions of his owners is not barratry if done by the master without fraud.²

Aliter, if
fraud be con-
joined.

On the other hand, if the deviation be in fraud of his duty to his owners, and for the private purposes of the master, this is barratry from the moment the ship is carried out of her course.

The captain of a ship insured from London to Seville, sailed for Guernsey, out of the course of the voyage, to take in brandy and wine on a smuggling adventure of his own unknown to the charterer (who was owner *pro hac vice*), and the night after sailing sprung a leak, which compelled him to put back, and ultimately to abandon the voyage: this was held by Lord Mansfield to be a clear case of barratry.³

Even dropping anchor and going ashore in a boat to find a market for his own private adventure of negroes on board was held by Lord Kenyon to be barratry in the captain, commencing from the moment of his first going out of his course for that purpose.⁴

Unreasonable delay, generally as we have seen, discharges the underwriter, as a variation of the risk; and if this delay be employed by the captain for the purpose of committing an act of barratry (as by an elaborate forgery of all the ship's documents, &c.), then the delay is part of the barratry for which the underwriters are liable, and not a deviation by which they are excused.⁵ "Criminal delay," in fact, as expressed by Burroughs, J., "is a barratrous act."⁶ It is there-

¹ *Phyn v. Royal Exch. Ass. Co.*,
7 T. R. 505.

² *Bottomley v. Bovill*, 5 B. & Cr.
210.

³ *Vallejo v. Wheeler*, 1 Cowp. 143;

S. C., Lofft, 645.

⁴ *Ross v. Hunter*, 4 T. R. 33.

⁵ *Roscow v. Corson*, 8 Taunt. 684.

⁶ *Ibid.*

fore essential that the cause of the delay appear to have been wilful.¹

If the captain is compelled by the mutinous violence of the crew to deviate from his course, though in the teeth of express instructions to the contrary, this is not such a deviation as discharges the underwriters, nor is it "barratry of the master," although, as it seems, it would be barratry of the mariners.² Barratry of
the mariners.

There have not been many decisions as to what will amount to barratry by the mariners; but it seems quite clear, that when any crime or fraud attended by or producing the loss or destruction of the ship is committed by the mariners, under such circumstances of violence or treachery that it could not have been prevented by the prudence or vigilance of the owner, or of the master as his agent, this is a loss by barratry of the mariners. On the contrary, if the owner or master might with ordinary force, or reasonable vigilance, have prevented it, this is not a loss by barratry of the mariners, as we have seen in the case where the ship was confiscated for repeated acts of smuggling committed by the crew.³

Where four of the mariners conspired with some prisoners of war on board, and having overpowered the master and the rest of the crew ran the ship ashore, where she was captured; as it appeared that the owners and master had not been guilty of any gross negligence, *e. g.*, by failing properly to secure the prisoners on board, this was held to be a loss by barratry of the mariners.⁴ And the judgment was the same in a case where only one of the crew, conspiring with some

¹ *Bradford v. Levy, Ry. & Mood.* 331; 2 C. & P. 137.

² See the case of *Elton v. Brogden*, as reported in 2 Str. 1264, and commented upon by Lord Mansfield in *Vallejo v. Wheeler*, 1 Cowp. 154; by Lord Alvanley in the case of *De Feise v. Stephens*, at the Cockpit, as cited

2 *Marshall, Ins.* 523, note (b); and, lastly, by Sir James Mansfield in *Scott v. Thompson*, 1 B. & P. N. R. 186, and 1 Park, *Ins.* 194.

³ *Pipon v. Cole*, 1 Camp. 434.

⁴ *Toulmin v. Anderson*, 1 Taunt. 227; *Toulmin v. Inglis*, 1 Camp. 421.

prisoners of war on board, forced the captain and the rest of the crew ashore and ran away with the ship.¹

The rule, in fact, is, that where the cause of the loss is a superior force originating with the crew, the underwriters are liable as for barratry by the mariners.

By and
against whom
barratry is
possible.

In considering what acts amount to barratry, we have seen by the definition of the term, that, they are acts done by the master and mariners in fraud of their duty to their owners,—the parties, that is, who are general owners of the ship, or the freighters who, under the terms of the charter-party, are her special owners for the voyage.

The owners.

No act, therefore, can be barratrous which is sanctioned or authorized by those who are either the absolute owners of the ship, or her owners for the voyage. “For,” as Lord Mansfield says, “nothing is so clear as that no man can complain of an act to which he himself is a party.”² And, in another place he says,—“Barratry is something contrary to the duty of the master and mariners, in the relation in which they stand to the owners of the ship. An owner cannot commit barratry: he may make himself liable by his fraudulent conduct to the owner of the goods, but not as for barratry; and, besides, barratry cannot be committed against the owner with his consent.”³

Upon these principles it has been decided in the two following cases, that the owner of goods cannot recover as for a loss by barratry in respect of any act of the master, however criminal, that is sanctioned by the owner of the ship.

Stamma v.
Brown.

Stamma, the plaintiff, insured goods for a voyage, in accordance with the bill of lading, from Falmouth to Marseilles, but learning afterwards that the ship was to touch at Genoa, Leghorn and Naples before putting into

¹ *Hucks v. Thornton*, Holt, 40.

² Cowp. 153.

³ Per Lord Mansfield in *Nutt v. Bourdieu*, 1 T. R. 323. This refers to

the case of a sole owner: a part owner may commit barratry as against his co-owners: *Jones v. Nicholson*, 10 Exch. 28.

Marseilles, he protested against it ; nevertheless, the ship, by the owners' directions, did put into these ports first, and was blown up by a Spanish ship on her way back to Marseilles. The plaintiff sued for this as a loss by barratry ; but it was held that he could not do so, as the master in what he had done had acted consistently with his duty to his owners, and with their privity.¹

The master of a French ship, at the instigation and by the direction of his owner who sailed on board, fraudulently signed false bills of lading, by which he made goods originally consigned to another firm, deliverable to the house of which his owner was a partner, and the goods under these false bills of lading were delivered to his owner's firm, and never paid for. The shipper of the goods sued for their value under a count for a loss by barratry, but the Court held that no such cause of action existed in the case.² Nutt v. Bourdieu.

Upon the same principle, Lord Ellenborough held, that the owner of a ship, which had been chartered for the voyage, could not recover under a count for barratry for a loss occasioned by an illegal act of the charterer's agent, such as *per se*, would have amounted to barratry. "If I give the dominion of my ship to a charterer," said his Lordship, "his acts are my acts : and in this case Kendal, whose orders the master implicitly obeyed, according to his instructions, was, in point of law, the agent of the plaintiff. Therefore the loss arose from following his own orders, and there is no pretence for imputing it to barratry."³ Charterer.

Upon the same principle it is clear that barratry cannot be committed by a master who is himself owner or general A master who is owner.

¹ *Stamma v. Brown*, 2 Str. 1173. See the remarks of Lord Ellenborough, 8 East, 126, 135, 136.

² *Nutt v. Bourdieu*, 1 T. R. 323.

³ *Hobbs v. Hannam*, 3 Camp. 93, 94. In 2 Selw. N. P. 973, a case of *Boutflower v. Wilmer* is cited, in which the point decided was, that the owner may recover for an act of barratry committed by the master

with the privity of the freighter ; but the distinction between these two cases, supposing both can be supported, must depend on the terms of the respective charter-parties (which are not given in either), the charter-party, it must be assumed, in the second case, being so worded that the charterer is not in law owner for the voyage.

freighter of the vessel. But this is for the underwriters to show; it is sufficient for the assured to have made out an act *prima facie* barratrous.¹

The equitable owner.

Where the captain was general owner of the ship which he had bottomried and mortgaged, but of which he still had the control and navigation, Lord Hardwicke held that he could not commit barratry, so as to give the assured on goods a claim against his underwriters as for a loss by barratry.²

So, where the master had given his promissory note for the amount of the purchase-money of a vessel, which was indorsed by another person to whom the bill of sale was made out and in whose name the ship was registered, as a collateral security, it was held, in the United States, that the master, under these circumstances, having an equitable interest in the ship, as owner, could not commit barratry.³

A master who is supercargo or consignee.

The fact that the captain is also supercargo, or consignee of the cargo, will not prevent the owner of the ship,⁴ or the owner of the goods from recovering for loss by his barratrous acts; for they are not committed in his character of consignee or supercargo, but in his character of master of the vessel, a character which he cannot lay aside until the entire completion of the risk.⁵

A master who is part owner.

But barratry against his co-owners may be committed by a master who is part owner. Hence where the master being part owner, sold the ship and cargo, and appropriated the proceeds to his own use, it was held, that this was a loss insured against by the words "barratry of the master," and per Martin, B., also by the words "all other perils, losses, and misfortunes."⁶

Where freighter is owner *pro hac vice*.

The ownership *pro hac vice* of a freighter is a question dependent mainly upon the true construction and effect of

¹ Ross v. Hunter, 4 T. R. 33.

² Lewin v. Suasso, Postlethwaite's Dict. art. Assurance, p. 147.

³ Barry v. Louisiana Ins. Co., 11 Martin, N. S. 630.

⁴ Earle v. Rowcroft, 8 East, 126.

⁵ 1 Emerigon, c. xi. s. 3, p. 370;

and see the American cases, Kendrick v. Delafield, 2 Caines, 67; Cook v. Commercial Ins. Co., 11 Johnson's Rep. 40, cited 1 Phillips, Ins., no. 1080. See also 4 Boulay-Paty, 76.

⁶ Jones v. Nicholson, 10 Exch. 28; 23 L. J. (Exch.) 330.

the whole of the charter-party by which in each case his relation with the vessel is created. As far as relates to the dominion they confer over the ship, charter-parties are of three kinds:—

1. Either the contract is *locatio operis vehendarum mercium*—a mere covenant to carry the charterer's goods in the owner's ship either for a gross sum, or at so much per ton, &c.:—or, 2. It is *locatio navis et operarum magistri*—a letting on hire of the ship in a state fit for the purposes of mercantile adventure, i.e., with the master and mariners on board, as well as all other means necessary for her navigation:—or, 3, (which is a much less frequent case,) It is *locatio navis*—an absolute demise of the ship herself with her furniture and apparel, leaving the master and mariners to be hired, paid and victualled by the charterer.

Now, in the first and last of these cases, the question of the charterer's ownership, in relation to the master and mariners, presents no difficulty. In the first case it is quite clear that First class. he has no such ownership, the entire possession of the vessel, and the management and control of the captain and crew, resting with the general owner. In the last case it is equally Third class. clear that the charterer is invested with the absolute dominion of the ship for the voyage, and stands in relation of owner to the captain and crew, whom he appoints, and who act under his control.

It is in the second case that the difficulty has mainly arisen. Second class. With regard to this class of charter-parties it may be laid down, that wherever, from the whole tenor of the instrument, without paying any undue regard to particular expressions, such as "demise and let," &c., it may fairly be collected to have been the intention of the parties that the charterer should have the substantial control and exclusive use of the ship for the voyage,—this will constitute him owner *pro hac vice* (at all events in relation to barratry), although the master and crew may be appointed and paid by the general owner. The possession or control thus exercised by the general owners over the master and mariners, such as it is, being in the words

of Lord Ellenborough, "not retained by them, in order to restrain or interfere with the full and free use of the ship which they have let to hire for a term, but as subsidiary and subservient to such use."¹

Without further reference to the cases on the general question, we proceed to examine those in which the question has been, whether the charterer is so far constituted owner for the voyage as that barratry may be committed against him by the master and mariners, even with the privity or instrumentality of the general owner.

Vallejo v.
Wheeler.

In the first case, of *Vallejo v. Wheeler*, Willes, the general owner of a ship, had, through Brown, his captain, chartered her to Darwin for a voyage from London to Seville.² Darwin put her up as a general ship, and several merchants, amongst others the plaintiff, sent goods by her, for which they were to pay freight to Darwin: the terms of the charter-party are not set out, but, it seems, the master and mariners were hired and victualled by Willes, the general owner. On the voyage, the master, with the privity of Willes, but without the knowledge of Darwin, went out of his course, to smuggle wine and brandy on a private adventure of his own, and sprung a leak by the way. Lord Mansfield held this act of the master's, although done with the privity of the general owner, was an act of barratry towards Darwin, for which the assured on goods might recover.³

Soares v.
Thornton.

In the next case, *Soares & Co.*, of London, chartered a Portuguese brig from Fontés, her owner and commander, to take on board at Pernau, on account of Soares & Co., 100 tons of flax, to be delivered at Oporto, Soares & Co. to be at liberty, if they chose, to fill her up with goods, over and above the 100 tons, the freight being payable at so much

¹ Per Lord Ellenborough in the *Master of the Trinity House v. Clark*, 4 M. & Sel. 288. See this question examined and the fluctuation of opinion in respect of it pointed out, *MacLachlan, Shipping*, 346 *et seq.*

² The names are reversed in the

report in Cowper; but the error is corrected by Buller, J., who had been of counsel in the cause, in *Nutt v. Bourdieu*, 1 T. R. 323, 330.

³ *Vallejo v. Wheeler*, Cowp. 143; *S. C.*, better reported in Lofft, 645.

per ton. The master and crew were hired, paid, and victualled by the owner. The ship, commanded for the voyage by Gouvea, a Portuguese, was entirely filled up at Pernau with goods by the agents of Soares & Co., on their account. On her voyage back she put into Deal to repair a leak, where Fontés came on board, and took the command of her, and shortly afterwards, Gouvea assenting, wilfully ran her ashore, by means of which the cargo was wholly lost.

Gibbs, C. J., held that as Soares & Co. had completely filled up the ship with their own goods at Pernau, the ship was thenceforth under their complete control, "to require her to proceed without the control of any other person, except themselves, to her place of destination." At the time of the loss, accordingly, they were exclusive owners; and the act which produced the loss having been committed without their concurrence, though with the connivance of the general owner, was, as against them, barratry.¹

This case, therefore, decides that whenever charterers are so circumstanced at the time of loss, as to have a right to the complete control and management of the ship, they are owners for the purposes of barratry, and barratry may be committed against them with the connivance of the general owners. Barratry as to charterers.

The principle of decision adopted in the American cases on this subject appears to be somewhat different from our own; the charterer there seems not to be considered owner for the purposes of barratry, except in those comparatively rare cases where the ship is absolutely demised to him, and the master and mariners are hired, paid, and victualled by him.²

Barratry, as the word is employed by the Italian jurists, and, generally speaking, in all the continental ordinances and policies, except the French, means, as it does in our law, Foreign law as to barratry.

¹ Soares v. Thornton, 7 Taunt. 627; S. C., 1 Moore, 373.

² See the American decisions, 1 Phillips, Ins., no. 1083. Mr. Parsons,

however, chiefly relies on the English cases cited above, and states the law to be as it has been laid down in the text here; 1 Parsons, Ins., pp. 566-575.

the wilful and criminal misconduct of the master and mariners, and not their mere fault or negligence. Non omnis navarchi culpa est barrataria, sed solum tunc ea dicitur, quando committitur cum præexistente ejus machinatione et dolo præordinato ad casum.¹ Taken in this sense, it is a risk which is not insured against by the common forms of several of the foreign policies; although it may, of course, be made the subject of insurance by express stipulation. Barratry of the master and mariners is expressly excepted in the policies of Spain, Portugal, and Alexandria.² It is not insured against, without express written stipulations, in those of the Italian ports,³ nor, in fact, in any port in the whole range of the Mediterranean coast except Marseilles, and then only in insurances on French ships.⁴ On the other hand, in the policies of the Dutch, German, Danish, Swedish, and Baltic ports, it is generally insured against, with some slight variations: thus, the Amsterdam policy insures against the fault of the master and mariners, the facts occurring without the co-operation or knowledge of the assured.⁵

A clause is inserted in the Boston (United States) policies, excepting in terms the case in which the assured is owner; it runs thus:—"Barratry of the master (unless the assured be owner of the vessel) and of the mariners."⁶ With this exception the policies of the United States, like our own, insure generally against the "barratry of master and mariners."

¹ Casaregis Disc. i. no. 77, cited 1 Emerigon, c. xii. s. 12, p. 365.

² See Vaucher's Guide, Alexandria policy, p. 1; Cadiz policy, p. 50; Lisbon policy, p. 84.

³ New Commercial Code of the Kingdom of Italy, art. 467.

⁴ See Vaucher, Comparative Table of Risks insured against, no. 1; and Introduction, p. xi.

⁵ Amsterdam policy, Vaucher, p. 7. By the new German Code, art. 824, § 6, the insurer undertakes the risk of dishonesty or default of any mem-

ber of the crew entailing loss on the subject insured.

⁶ Boston policy, Vaucher, p. 44. Emerigon laid it down as a rule of the law maritime, that the underwriters on ships could not be liable for barratry of a captain appointed by the assured (ship-owner); but Boulay-Paty, who examines the whole question, shows that this is erroneous: 1 Emerigon, c. xii. s. 3, p. 367 *et seq.*; Comment. of Boulay-Paty, *ibid.* p. 371, and see his *Droit Mar.*, tom. iv. p. 74 *et seq.*

In France the Code de Commerce declares, by Article 353, that "the insurer is not chargeable for the malversations and faults of the captain and crew, known under the term *barratry* of the master, unless there be a stipulation to the contrary."

It appears that the commissioners who digested the Code, had intended to confine the word *barratry* to the sense of wilful and criminal misconduct ("*prévarication*"); but, on the strong representations of the Cour Royal of Rennes, they altered their intention, and by means of the word "*fautes*," gave it the old extensive effect.¹ Boulay-Paty and Pardessus accordingly inform us that the word *barratry* in French law has the same meaning since, as it had before the Code, and embraces every fault of the master or mariners by which a loss is occasioned, whether arising from fraud, negligence, unskilfulness, or mere imprudence.²

At the end of the enumeration, by name, of the different perils against which the underwriter undertakes to indemnify the assured, are added the words "and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods, merchandises, and ship, &c. or any part thereof." "All other perils, losses, and misfortunes."

This general and sweeping clause, it is now decided covers other cases of marine damage, of the like kind (*ejusdem generis*) with those specially enumerated, and occasioned by similar causes.

Thus, Lord Ellenborough, in the first case on the effect of this clause, held that, where one British ship had fired upon and sunk another, mistaking her for an enemy, this, though not a loss by perils of the seas, fell within the scope of the general clause, and was recoverable under a special allegation of the cause of loss as it really occurred.³ The

¹ 4 Boulay-Paty, Droit Mar. 62.

³ Cullen v. Butler, 5 M. & Sel.

² Ibid.; 3 Pardessus, Droit Com., 461.
no. 772.

same was the decision in the case of dollars thrown overboard by the master at the moment of being captured, to prevent them falling into the hands of the enemy.¹ So, in the case where a ship in a graving dock was blown over by the wind and injured;² and again, where a ship was bilged and rendered incapable of pursuing her voyage by the accidental giving way of her tackle and supports, while in the act of being moved out of a dock into which she had been put for repairs;³ and again, where the wreck of a steamship was caused by the explosion of her boiler under the ordinary pressure of steam in moderate weather.⁴ So the bursting of the air chamber of the donkey engine by cold water being forced up into it in consequence of the accidental or negligent closing up of a valve at the end of the supply pipe where it communicated with the ship's boiler.⁵

The Judges who determined the case of *Davidson v. Burnand*,⁶ where the cargo was damaged by sea water, through a waste pipe being accidentally left open, seemed to think it a loss by perils of the sea, but were quite sure it was at all events covered by this clause.

On the same principle, where an insurance was effected on goods "at and from London by land carriage to Harwich, and thence by packet to Gottenburg," it was held, that the loss of these goods in the course of their land carriage from London to Harwich was recoverable, under a special count upon this clause, the policy being in the common printed form.⁷

A vessel chartered for a voyage from Liverpool to Newport, and thence to San Francisco, on her way to Newport got aground in Carnarvon Bay on the 2nd of January; she

¹ *Butler v. Wildman*, 2 B. & Ald. B. D. 51.
398.

² *Phillips v. Barber*, 5 B. & Ald.
161.

³ *Devaux v. J'Anson*, 5 Bing. N.
C. 519.

⁴ *West India Telegraph Co. v.*
Home and Colonial Ins. Co., 6 Q.

⁵ *Hamilton v. Thames and Mersey*
Marine Ins. Co., 17 Q. B. D. 195.

⁶ *Davidson v. Burnand*, L. R. 4
C. P. 117.

⁷ *Boehm v. Combe*, 2 M. & Sel.
172.

was not got off so as to return to Liverpool before the 12th of April. Meanwhile the charterers determined the charter-party, and hired another vessel. It was held (*dissentiente Bovill, C. J.*), that the delay having frustrated the commercial objects of the charter-party, justified the charterers in what they had done, and as the loss of freight occasioned thereby was the consequence of a peril insured against, the shipowner was entitled to recover it from the underwriter.¹

The assured, as a general principle, may recover from the underwriter in respect of any extraordinary expenditure which he has necessarily incurred in consequence of any of the perils insured against; and also in respect of all charges or contributions which, either by the law of the land, or the general law maritime, follow as a direct legal consequence to these perils.

Losses which are the legal or necessary consequences of the perils insured against.

Thus, he is liable to the assured in respect of sums which the latter has been compelled to pay by way of general average contribution, or by way of salvage, or in reclaiming captured property, or in repairing damage done to the ship by the perils insured against, &c.

The subject of general average contribution is of too great extent, and has too important a connection with the law of marine insurance, to be treated of incidentally in this place, and must be reserved for a separate chapter.²

With the subject of salvage, except so far merely as it concerns the assured and the underwriters, we do not propose to deal; the whole doctrine having been discussed in several well-known treatises on shipping, to which branch of the law maritime its consideration more properly belongs.

Salvage, in so far as it is a claim to which the insurer is liable, designates an expenditure necessarily laid out in preserving the subject of insurance from a loss for which the

¹ *Jackson v. Union Marine Ins. Co.*, L. R. 8 C. P. 572.

² See post, Chap. IV.

insurer would be liable under the policy, and is recoverable from him in virtue of an express clause in the policy inserted for such a case, and known as the "sue and labour clause." Upon this clause, therefore, as being brought into use by the operation of one or more of the perils insured against exposing the subject insured to loss, should the Statement of Claim be based.¹

Aitchison v.
Lohre.

In 1879, in the case of *Aitchison v. Lohre*,² being an action on a policy on ship, an appeal was brought to the House of Lords. It appeared that in the course of her voyage the vessel had sustained much damage by sea perils, so that she was become leaky and water-logged, helpless, and not navigable, and in great danger of being completely lost; in this state, therefore, those on board signalled the steamer *Texas* for assistance, which accordingly took her in tow and brought her into Queenstown. In the Queen's Bench such was the estimate of the damage sustained by the ship, that the assured had judgment for 100% per cent., *i.e.*, for the full sum insured; and as this, in the opinion of that Court, exhausted the policy, the action was dismissed as to a further claim of 500% for general average, and for salvage paid by the assured as the contribution for ship under these heads.

Appeal Court.

The Court of Appeal affirmed the judgment for 100% per cent., and after citing the foregoing passage in the text, gave judgment for the assured for his further claim. In the Lords, on the motion of Lord Blackburn, the House affirmed the judgment for 100% per cent., and reversed the judgment as to the further claim. His reasons for opposing this claim were that the "sue and labour" clause, though intended to encourage the personal exertions of the assured and his agents and servants for the preservation of the ship by

House of
Lords.

¹ See per Willes, J., in *Kidston v. Empire Ins. Co.*, L. R. 1 O. P. 535.

² *Lohre v. Aitchison*, *Aitchison v. Lohre*, 4 App. Cas. 755; 3 Q. B. D. 553; 1 Q. B. D. 502.

in the Lords, *Dixon v. Whitworth*, 4 C. P. D. 371, and *Dixon v. Sea Ins. Co.*, came on in order of the list before the Court of Appeal, and without argument by counsel judgment in each was reversed.

Upon the authority of this decision

providing for the expense attending such personal exertions, and perhaps for the hire of additional labour where that was necessary, did not provide an additional remedy for a claim such as salvage, which, considered as a labour, was performed by those who were not the agents of the assured, and considered as a reward, was determined under the maritime law by the Court of Admiralty.

It cannot be doubted, after perusal of the evidence which I reprint at the end of this chapter,¹ that Lord Blackburn, at the time of delivering this judgment, was in total ignorance of the proper meaning of the terms of the clause in question, and of the popular usage in which they originated. When that meaning comes to be known, it is obviously no question within the effect of the clause, whether the salvors in the case were or were not the agents of the assured to do that salvage. The agents in the case, answering to the agents mentioned in the clause, were the master and crew of the assured in possession of his ship, and were at the time confessedly helpless; these men could do nothing for the salving of the ship, their means by that time being exhausted. To talk, therefore, about their labouring, in Lord Blackburn's sense, for the safeguard and preservation of the ship in these circumstances is neither suitable to the facts as they then existed, nor consistent with the sense of a rational being. But helpless as they undoubtedly were, they could yet apply to others to save their ship [the *sue and labour* of the clause in the proper sense of these terms]; and they could secure those others a just reward for the salvage within the express authority of the clause,—“to the charges whereof we, the assurers, will contribute each one according to the rate and quality of his sum herein assured.” To pursue further the terms of this infelicitous judgment would be to corroborate the proof elsewhere given of the ignorance which Lord Blackburn shared in common with every Englishman at that time existing. The charge against Lord Blackburn, if any were

Observations
on the judgment.

¹ See Appendix to this Chapter, post, p. 807.

here intended, is a charge, not of ignorance, but of imposing a meaning upon the terms of the contract before the House, which is in defiance of any and every canon of construction ever received and acted on among educated men; and the only way of accounting for the result arrived at by him is that Lord Blackburn, in virtue of his great learning and authority in the law, was, on this occasion as upon some others, "a law to himself" in spite of all law.

Uzielli v.
Boston Mar.
Ins. Co.

In 1885, certain reinsurers on ship,¹ who had themselves reinsured with the defendants, brought their action for a loss amounting to 112*l.* per cent. The ship insured had been driven ashore on the rocks near Leith, and had thereby sustained damage to the value of 88*l.* per cent. But in order to float the ship off the rocks, the labour necessary occupied three months, at an expense of 5,812*l.* The ship had been abandoned to the original insurers, and they employed Lloyd's Salvage Association to save the ship. Mathew, J., gave judgment for 1,000*l.*, the full sum insured, and also for 120*l.*, the remainder of the claim consisting of so much of the salvage money as was not covered by the difference between 88 and 100 per cent. The Court of Appeal reversed the judgment to the extent of the additional 120*l.*, and by the Master of the Rolls gave their reason for this as follows:—²

Appeal Court. "This is simply a policy on the ship to the extent of 1,000*l.* But then the question arises, can the plaintiffs recover more than 1,000*l.* by reason of the suing and labouring clause in this policy? The difficulty is the true construction of that clause in this policy [being a policy of reinsurance]. That is the question which has made us hesitate. I myself should be inclined to give to that clause all the width that I could; I should be inclined to hold that it gave the assured [*i. e.*, the reinsured plaintiffs] in this policy, power to sue and labour for the benefit of the adventure; I think that the assured

¹ Uzielli v. Boston Mar. Ins. Co.,
15 Q. B. D. 11.

² Ibid. p. 17.

would have sufficient interest in the ship to entitle them so to do. But in this case the suing and labouring for the safeguard and preservation of the ship was not by the assured under this policy, but by other underwriters. Those other underwriters were not either the 'factors,' the 'servants,' or the 'assigns' of the reassured. If the word 'agents' had been inserted, I should have hesitated more; but the clause is drawn in the common form, and it does not cover such a case as this, where there is a policy of reinsurance upon a reinsurance."

The word "agents," which would have made the learned Judge hesitate more, *is inserted*; but in the ancient English of the clause it is spelt "factors," in which form it retains in this clause all the width of sense with which in our day the term "agents" is used. Observations.

The difficulty is to find out where Lord Esher's difficulty lies, unless it be in evading the true sense of the clause, by that time well known to him, out of deference to the error of the Lords' decision in *Lohre v. Aitchison*. The case stands thus:—The insurers being possessed of the ship by abandonment and acting in the case for all concerned, applied to Lloyd's Salvage Association to rescue the ship. After this, the plaintiffs adopt this act or agency of the original insurers, evidence of which adoption is to be found in the bringing of the action to recover the salvage. Lord Esher adds, by way of increasing his difficulty, that an agent cannot appoint an agent without express authority. But if no agents were appointed because within the meaning of the clause none were required, where then is the difficulty? The difficulty is where? For if to sue, labour, and travel be to apply for a benefit which the Association could confer and have conferred, then that is all that the insurers have done, and the plaintiffs have ratified their act. A plainer case, in view of the proper sense of the clause, never came before a Court of law.

It must be admitted, however, that the Court of Appeal could not have given judgment otherwise than they did, unless evidence had been offered which was not produced at

the bar of the House of Lords, of the ancient popular usage as to the terms of the clause, and their peculiar sense and effect derived from that usage. Sooner or later that evidence must be produced in Court, and ultimately produced at the bar of the House of Lords. Why it was not produced, at all events offered in the Court of Appeal in this case, is one of those unaccountable things which, to persons not informed of the reasons and counter-reasons which govern suitors and their advisers, wear the appearance of gross negligence. In consequence of that omission this judgment, the earliest of any importance in the matter of Reinsurance in this country, and much to have been desired if founded on the true sense of the clause, is absolutely of no value, and takes its place in that respect with the decision of the Lords in *Aitchison v. Lohre*.¹

Salvage on recapture.

Before an action will lie for a loss by payment of salvage upon a recapture, the amount of such salvage should ordinarily be ascertained by a tribunal having jurisdiction in such matters, and the proceedings before that tribunal produced on the trial of the action on the policy.²

Expenditure under the sue and labour clause.

Besides salvage properly so called, there are frequent occasions for expenditure within the meaning and intent of the policy, by way of preventing or mitigating losses that would fall upon the insurer, which expenditure is recoverable under the "sue and labour" clause.

This clause³ comes into operation only "in case of any loss or misfortune" that would fall upon the insurers, and

¹ The extraordinary expedient for evading the effect of the Lords' blunder, suggested by Lord Esher, of overinsuring to the amount of the possible expenditure necessary in recovering the ship, say 5,800%. in the case before the Court (for the plaintiffs might well have reinsured the whole amount), means bankruptcy to those that would adopt it. Such shifts reflect severely on the Lords

and their neglect to undo the mischief of their decision.

² *Thellusson v. Shedden*, 2 B. & P. N. R. 228.

³ Any one desirous of understanding the law upon this subject should consult the very learned and remarkable judgment, per Willes, J., in *Kidston v. Empire Insurance Co.*, L. R. 1 C. P. 535.

not otherwise. Consequently, under a policy on goods "warranted free from average," where some loss was suffered and some expense was incurred, but there never was any danger of a total loss, it was held that the insurers were not liable under this clause for the expenditure incurred.¹

On the contrary, under a similar policy from the Chincha Islands to Cork, on freight, "warranted free from particular average," where the vessel with her cargo on board was driven by stress of weather into Rio Janeiro, and the cargo was unloaded, and the ship was found to be unfit for the voyage and not worth repairing, so that there would have been a total loss of the freight unless the cargo could be transhipped and sent on, it was held that the insurers were liable for the expense of transhipment, and for the money paid as freight to the second vessel that brought the cargo home.²

The result in this last case showed that there had been no loss whatsoever on the subject of insurance; the full freight was earned and received. That was the proper effect of the clause. Prevention of loss is the very object in view. It contemplates the benefit of the insurers only, and the insurers on that account undertake for the expenditure. Cases therefore do frequently occur in which the insurers by the operation of this clause are saved from loss, and the damage done is thrown upon the assured.³ For instance, under a policy on goods warranted free from average under 5 per cent., the goods, suppose, have been wetted by sea water; the damage to them, unless they are taken out and dried, would go on increasing beyond the 5 per cent., till it threatened the cargo with destruction; but they are dried at an expense of 3, 2, or 1 per cent., and the damage done is

¹ Great Indian Peninsular Ry. Co. v. Saunders, 1 B. & S. 41; 2 *ibid.* 266; 30 L. J. (Q. B.) 218; 31 *ibid.* 206; Booth v. Gair, 15 C. B. (N. S.) 291; 30 L. J. (C. P.) 99. See both cases considered, per Willes, J., in

Kidston v. Empire Ins. Co., *supra*.

² Kidston v. Empire Ins. Co., *supra*.

³ Per Willes, J., in Kidston v. Empire Ins. Co., L. R. 1 C. P. 543, 544.

less than 5 per cent. The insurers bear the cost of drying, and the assured the loss by sea damage.¹

By this clause the insurers undertake an additional liability over and above the insurance, properly so called, and quite of a different nature. Amongst practical men the expenditure incurred under the clause is known as "particular charges;" that other phrase, "particular average," being with these same persons confined to damage done to the subject of insurance by any of the perils insured against. And the Courts have intimated that in their opinion this is the appropriate signification of the phrase "particular average" under a marine policy.² It follows that "particular charges" cannot be added to the damage done to the subject of insurance, so as ever to become particular average, and thereby to alter the rights and liabilities of the parties to the contract.

The expenditure must be necessary.

It would seem, therefore, notwithstanding what has fallen from a learned judge to the contrary,³ that "particular charges" are more properly recoverable under averments in the Statement of Claim upon the sue and labour clause.⁴

It need hardly be said that expenditure when made on a proper occasion is recoverable under this clause, only so far as it can be shown to have been reasonably necessary.

A ship with a cargo of palm oil from Cameroons in Africa, for Liverpool, stranded on the Welsh coast near Pwllheli, and it became necessary to land her cargo. This was done, and the ship, after temporary repairs on the beach, was towed to Carnarvon, and there made seaworthy for the rest of the voyage. Meanwhile, the shipowner had sent the cargo overland by rail to Liverpool at an expense of 212*l.* 15*s.* 1*d.*, and thereby earned his freight. In an action on his policy on freight to recover this expenditure, it was held that although the occasion and purpose justified some expenditure,

¹ Per Willes, J., in *Kidston v. Empire Ins. Co.*, L. R. 1 C. P. 543, 544.

³ *Le Cheminant v. Pearson*, 4 Taunt. 367.

⁴ See per Lord Ellenborough, in

² See L. R. 1 C. P. 538, 546, 552. *Livie v. Jansen*, 12 East, 655.

namely, to prevent a total loss of the freight, yet as he might have retained the oil till his ship was repaired, and have reshipped it at Tidswell's Roads at an expense of 70%, he was entitled to recover 70% and no more.¹

Besides claims of this nature, other disbursements incurred in the course of the voyage, in consequence of extraordinary casualties, for the benefit not of the whole adventure, but of part of it, as of the ship alone, are recoverable from the underwriter, either under a special statement in the Statement of Claim, or, generally, as a consequence of some of the perils insured against. Other disbursements.

Actual disbursements necessarily made in a port of distress for repairing damage done to the ship in the course of the voyage by the violent operation of the perils insured against, are particular average, and are recoverable from the underwriter upon an averment of loss by those perils. None of these repairs, however, must be such as are properly attributable to the ordinary wear and tear of the voyage, for which, as we have already seen, underwriters are not responsible. Expense of necessary repairs.

Lord Ellenborough, adverting to such expenditure when followed by a total loss, goes so far as to suggest, that it should be recovered under the sue and labour clause, instead of being combined with the total loss and sued for as a cumulative loss under the general clauses of the policy.²

In calculating the amount for which the underwriter is liable in respect of repairs to the ship, a deduction is always made, in the case of wooden ships, of one-third of the value of the new work which replaces the old.³ Upon the subject of this deduction, generally known in insurance law by the term of "one-third new for old," we shall have more to say in treating of the adjustment of particular average losses.⁴

As capture or hostile seizure, *prima facie*, dissolves the

¹ Lee v. Southern Ins. Co., L. R. 5 C. P. 397.

² In *Livie v. Jansen*, 12 East, 655.

³ No similar deduction is made in

the case of iron ships: indeed such a deduction is said to be quite inapplicable to the case.

⁴ Post, Chap. V.

Expenses of endeavouring to procure restoration of captured ship.

contract of affreightment, or, at all events, suspends it for a time,¹ the wages, provisions, and other expenses of the master and crew, in endeavouring to procure a restoration of the captured ship, or the detained cargo, such expenses not being comprised within those ordinary services of the voyage which are payable out of the freight, give the assured a claim against the underwriter on ship, or on cargo, according as the ship alone, or the cargo alone, is the sole cause of seizure and detention. Where the services of the master and crew are thus given for the joint benefit of both ship and cargo, as in case both are the subject of detention, the expense incurred becomes a subject for general average contribution, and as such falls upon the respective underwriters.²

Not the expenses during detention by embargo.

But an embargo, detention, or arrest of princes, does not thus work a dissolution of the contract of affreightment, nor even suspend it, however long it may last; such a casualty, in fact, leaves the relation and relative rights of the parties wholly untouched:³ the shipowner, therefore, owes all the services of his crew during this period to the freighter, and their wages and provisions during the detention are a charge upon the freight, an ordinary expense of the voyage, which the shipowner, although insured, cannot recover against his underwriters.⁴

Upon the same principle it is that the wages and provisions of the crew during the ship's detention in a port of distress for repairs are not recoverable from the underwriter as an average loss, but must be borne by the shipowner, as one of the necessary expenses of earning freight.⁵

The principle of all these cases is thus shortly and clearly expressed by Mr. Benecke:—"The owner owes the services

¹ *The Hiram*, 3 C. Rob. Ad. R. 180; *Liddard v. Lopes*, 10 East, 526.

² See post, Chap. IV., *General Average*.

³ *Hadley v. Clarke*, 8 T. R. Rep. 259.

⁴ As to ship, see *Eden v. Poole*, 1 Park, Ins. 117; *Robertson v. Ewer*,

1 T. R. 127. As to freight, see *Sharp v. Gladstone*, 7 East, 33; *Everth v. Smith*, 2 M. & Sel. 278.

⁵ *Lateward v. Curling*, 1 Park, Ins. 288; *Fletcher v. Poole*, *ibid.* 115; *aliter* in France, Co. de Com., art. 403.

of the crew to the freighter and to the ship herself during the whole voyage, and consequently also during the time of repairs or detention, which forms part of the voyage, and he cannot call upon the underwriter for expenses which are foreign to his (the underwriter's) contract."¹

As to goods, the underwriter thereon is not responsible, On goods. under the common form of policy, for loss which the merchant may incur by having to pay the same freight on goods arriving sea-damaged at their port of destination, as he would have had to pay had they arrived there sound. The risk of loss arising from this cause is wholly foreign to the underwriter on goods.² As in the case of ship, so in the case of goods, expenditure that has become necessary and is properly laid out to prevent or mitigate a loss that would fall upon the insurer, as for instance, by drying a cargo of corn or seed that has been sea-damaged, is recoverable from the insurer under the sue and labour clause of the policy.³

Where goods are necessarily sold by the master in a port of distress to defray the expense of repairing the ship, the loss sustained from the sale by the shipper of the goods may be recovered by him against the owner of the ship, but cannot be claimed as an average loss from the underwriter on goods.⁴ Loss on sale of goods to repair ship.

The expenses incident to the sale by auction of sea-damaged goods are, as we shall see in treating of adjustment, added to the average loss payable by the underwriters on goods.⁵ Expenses of damaged sales.

As Mr. Stevens remarks, the word "average" is very Freight. inapplicable to claims for partial losses on freight, which, in

¹ Benecke, Pr. of Indem. 463.

² Baillie v. Moudigliani, 1 Park, Ins. 116. See Farnworth v. Hyde, L. R. 2 C. P. 204, 225.

³ Per Willes, J., Kidston v. Empire Mar. Ins. Co., L. R. 1 C. P. 535.

⁴ Powell v. Gudgeon, 5 M. & Sel. 431; Sarquy v. Hobson, 2 Br. & Cr. 7; 3 Dow. & Ry. 192; S. C. 4 Bingh. 131; 12 Moore, 474; Duncan v. Benson, 1 Exch. 537; Benson v. Duncan, 3 Exch. 655.

⁵ See post, Chap. V.

fact, can only arise in one case, viz., a total loss of freight on part of the cargo.¹

It seems that in this country a claim in respect of partial loss on freight can only be made good either,—1st, when only part of the full intended cargo out of which the freight was expected to arise was on board, or contracted for at the time of loss²—or 2nd, when some separable part of the whole cargo (*i. e.*, separately valued or insured by the policy)³ goes in bulk to the bottom of the sea.⁴ In both these cases there is a clear total loss of part, or partial loss, of freight, which must be adjusted by the underwriter in the mode hereafter to be indicated.

A third case, it seems, may arise. If a ship with a full cargo on board is so damaged that she can only be so far repaired at the port of distress as to take on part of the cargo, and the residue is thereupon necessarily and justifiably sold, it has been intimated that there may be a total loss on that part of the freight which the ship is thus incapacitated from earning.⁵

In the following case, however, it was decided that, where the ship can be so repaired as to take on all the cargo, even a justifiable sale by the master of part of the cargo at an intermediate port, whereby the freight of such part was lost to the shipowners, did not give them a claim against the underwriters on freight, as the loss was not due to any of the perils insured against.

Mordy v.
Jones.

A ship, the freight of which was insured for a voyage “from Kingston in Jamaica, to Liverpool,” sailed from Kingston with a full cargo of cotton, coffee, and other colonial produce; but soon afterwards, from the starting of a plank in violent weather, was forced to put back, and for the purposes of repair to unload the whole of her cargo. After

¹ Stevens on Average, 174; Brockbank v. Sugrue, 1 Moo. & Rob. 102.

² Forbes v. Aspinall, 13 East, 323; Forbes v. Cowie, 1 Camp. 520.

³ Ralli v. Janson (in error), 6 Ell. & Bl. 422; 25 L. J. (Q. B.) 300.

⁴ Stevens on Average, 174.

⁵ Per Maule, J., in Moss v. Smith, 9 C. B. 104.

the ship was repaired, and was proceeding to reload for the voyage, it was found that part of the cargo had been so wetted by sea water, in consequence of the starting of the plank, that it could not be reshipped without danger, from ignition, to the ship and the rest of the cargo, except after a process of washing with fresh water and drying in the sun, which would have detained the vessel six weeks, and been attended with expense equal to the freight. Under these circumstances, the master, prudently, it is admitted, sold the damaged goods, with the approval of the shippers (who, however, refused to interfere); then finding he could not obtain other goods to complete his cargo in reasonable time, and being pressed by the shippers of the rest to set sail, he departed for Liverpool with the net proceeds of the damaged goods, which he paid over to the parties interested without retaining freight. The shipowner claimed from the underwriters a total loss of freight on the goods thus sold; but by the Court it was held that the underwriter was not liable, because the loss was due to the commendable prudence of the master, and not to any of the perils insured against.¹

The same principle was applied in a later case, where the master, while his ship was taking in cargo in Hondeklip Bay, 140 miles from the Cape of Good Hope, was suddenly driven out to sea, and, as he had bent the spindle of his capstan in slipping his cable, he sailed for repairs, not to the Cape, where they could have been done, but to St. Helena, 1800

Philpott v. Swann.

¹ *Mordy v. Jones*, 4 B. & Cr. 394. Both Mr. Phillips (vol. i. no. 1142) and Mr. Arnould have erroneously assumed a collateral observation of Lord Tenterden in delivering judgment as the basis of that decision, and have therefore disputed the decision itself. I have substituted the real ground of the decision in the text; and for this, and for the soundness of the decision itself, have the express authority of the learned Judges who participated in the decision of *Moss v.*

Smith, 9 C. B. 94; and of *Philpott v. Swann*, 11 C. B. N. S. 270; 30 L. J. (C. B.) 358.

The observation thus misapplied was this:—"If it should be held in a case of this kind, that the underwriter would be liable to make good the loss of freight, it would open a temptation to the master of a ship to sail away under circumstances like these, instead of stopping until the goods could be reshipped, which would be very mischievous."

miles off, where they could not be done. He intended, when repaired, to have returned for the rest of his cargo, but finding at St. Helena that the repairs could not be done he sailed thence direct for England with only part of his homeward cargo on board. In an action for this partial loss of freight the jury found for the assured, and that he had acted as prudently as an uninsured owner would have done; but the Court afterwards on motion ordered judgment to be entered for the insurer, as the loss of freight was wholly due to the course pursued by the master, and not to any of the perils insured against.¹

Loss where
only *pro rata*
freight
earned.

Where, through the perils insured against, only freight *pro rata* is earned, the loss in the United States is adjusted as a salvage loss, *i. e.* the underwriter pays the whole amount of the insurance, deducting the *pro rata* freight.²

Expenses of
reshipping
cargo.

When a ship has put into a port of distress for repairs, and to that end the cargo must be unloaded, the charges of reshipping the cargo will fall upon different persons according as the occasion of the ship making the port is a particular or a general average loss.³ Where a ship was detained, and her homeward cargo unloaded, under embargo of the foreign government in whose port she was preparing for her homeward voyage, it was held that the expense of reshipping this cargo ought to be deducted from the freight earned before paying it over to the underwriters after the adjustment of a total loss.⁴

The outlay for wages and provisions incident to such detention or to a delay for repairs, seems to be no more chargeable on the underwriter on freight than on the underwriter on ship, and for the same reason.⁵

¹ *Philpott v. Swann*, 11 C. B. N. S. 270; 30 L. J. (C. P.) 358; as is pointed out by Maule, J., in *Moss v. Smith*, 9 C. B. 109, the case is one to which the uninsured owner principle is totally inapplicable.

² *Coolidge v. Gloucester Mar. Ins. Co.*, 15 Massachusetts Rep. 345; 2

Phillips, Ins. no. 1440.

³ Chap. IV., post, *General Average*.

⁴ *Sharp v. Gladstone*, 7 East, 24; in this case there had been an abandonment.

⁵ The contrary was supposed to have been intimated by Buller, J., in *Eden v. Poole*, as reported by Park

It has been decided in this country, that if a ship ultimately earn freight, though not that intended for her, the expense consequent on delay or detention in the course of the voyage, by reason of some of the perils insured against, as in case of repairs, of being icebound, &c., is no ground of claim against the underwriters on freight;¹ but the expense of putting the substituted cargo on board at a port of distress, is to be deducted from the freight paid over as salvage to the underwriters who have adjusted as for a total loss.²

Whether it is the duty of the master, in case of damage to the cargo, to incur expense in drying it or otherwise restoring it to a transportable condition, must depend on circumstances;³ wherever these are such as to justify the master in what he has done, the underwriters ought, on principle, to be bound by his proceedings, unless the damage in question was the result of his own negligence.⁴

Where the original ship is lost or disabled, and the goods are sent on by the master in a substituted ship for the benefit and at the expense of the owner of the goods, the extra expense of transport beyond the amount of the original freight, may, it seems, be thrown on the underwriters on the goods; if, however, they were sent on for the sole purpose of earning freight, this expense should, on principle, be borne by the underwriter on freight.⁵

Extra charges
caused by
transhipment.

With regard to profits, it has been held in the United

on Insurance; but the report was found incorrect by Mr. East, as stated by him in a note to *Sharp v. Gladstone*, 7 East, p. 32. See also *Everth v. Smith*, 2 M. & Sel. 278.

¹ *Brockelbank v. Sugrue*, 1 Mod. & Rob. 102. S. P. as to loss of freight, *Everth v. Smith*, 2 M. & Sel. 278.

² *Barclay v. Stirling*, 5 M. & Sel. 6.

M.

See *Sharp v. Gladstone*, 7 East, 24.

³ See *Notara v. Henderson*, L. R. 5 Q. B. 346.

⁴ 2 Phillips, Ins. no. 1452.

⁵ *Kidston v. Empire Ins. Co., L. R. 1 C. P. 535*; 2 *ibid.* 357. So in the United States in *Saltus v. Ocean Ins. Co.*, 12 Johnson's Rep. 107; *Schieffelin v. New York Ins. Co.*, 9 *ibid.* 21; 2 Phillips, Ins. no. 1438.

3 G

States, that, when the goods, out of which the profits are to come, arrive sea-damaged, or a part of them is totally lost, this is *pro tanto* a partial loss on the profits, and to be adjusted accordingly;¹ and the same has been there held where part of the goods have been necessarily sold through damage done to them.²

¹ *Loomis v. Shaw*, 2 Johnson's Cases, 36.

² *Waln v. Thompson*, 9 Serg. & Rawle, 715.

RECOVERY OF SALVAGE AND GENERAL AVERAGE UNDER THE SUE AND LABOUR CLAUSE OF THE ENGLISH POLICY.

THE JUDGMENT OF THE HOUSE OF LORDS

IN

LOHRE *v.* AITCHISON

(4 App. Cas. 755)

CONSIDERED.

THIS was an action by a shipowner on a policy of insurance, in what is THE CASE.
called the Lloyd's form, on ship to recover an average loss together with
salvage and general average. In consequence of the peculiar circumstances
of the case the plaintiff recovered under his claim for an average loss 100
per cent., that is to say the full amount insured, as for damage to ship alone.
Hence it came that for his claim on account of salvage and general average,
he could only recover, if at all, on the "sue and labour" clause as being a
promise and contract besides and additional to the substantive contract of
insurance on the policy. And whether he could so recover upon that clause,
become for the first time within the period covered by reported cases on
marine insurance, say two hundred years, the subject of judicial construction
in England, was the question.

The Law Lords forming the House for the consideration of this case were The Lords.
Lord Chancellor Cairns, Lord Hatherley, Lord O'Hagan, and Lord Black-
burn. Lord Blackburn moved the judgment of the House, the other Lords
mentioned were concurring judges, Lord O'Hagan alone expressing great
hesitation in agreeing with the judgment.

Lord Blackburn in moving judgment, said, "*The Crimea* (the vessel THE JUDG-
MENT.
insured) on the voyage home during the month of January encountered a
succession of stormy weather, and in consequence of the perils of the seas
great damage was done to her, and she was reduced to a leaky and water-
logged condition. It appears incidentally that some general average had
arisen, for a proportion of which the ship was liable. On the 30th of
January the ship being then in great danger of being completely lost, and
being without fresh water or provisions, and in a helpless condition and not
capable of being navigated, those on board of her sighted the steamship
Texas which ultimately took her in tow, without any agreement being come
to as to remuneration for the service, and took her into *Queenstown*, and on or
before the 11th of March she was placed in safety near the wharf of the
Victoria Dry Dock Company."

"The policy contains the usual clause as to suing or labouring. The
Queen's Bench Division was of opinion that the salvage or general average
expenses described in the case did not come within that clause. The Court
of Appeal was of a different opinion. In the judgment delivered by Lord
Justice Brett it is said 'the general construction of the clause is that

if, by perils insured against, the subject-matter of insurance is brought into such danger that, without unusual or extraordinary labour or expense, a loss will very probably fall on the underwriters, and if the assured or his agents or servants exert unusual or extraordinary labour, or *if the assured is made liable to unusual or extraordinary expense in or for efforts to avert a loss*, which, if it occurs, will fall on the underwriters, then each underwriter will,' &c. Now if the part of this which is above emphasized is correct, there can be no question that both salvage and general average are unusual expenses to which the assured have become liable in consequence of efforts to avert a loss. And such seems to be the opinion of the editor of the last edition of Arnould on Insurance, who says¹ that salvage 'is recoverable from him in virtue of an express clause in the policy inserted for such a case and known as the sue and labour clause;' but for that position he cites no authority and though the Court of Appeal in this case agreed with him I am unable to do so. With great deference to the Judges of the Court of Appeal I think that general average and salvage do not come within either the words or the object of the suing and labouring clause and that there is no authority for saying that they do. The words of the clause are that 'in case of any [loss or] misfortune it shall be lawful to the assured, their factors, servants and assigns to sue labour and travel for, in and about the defence, safeguard and recovery of' the subject of insurance ['or any part thereof] without prejudice to this insurance, to the charges whereof we the assurers will contribute, each one according to the rate and quantity of his sum herein assured.' And the object of this is to encourage and induce the assured to exert themselves, and therefore the insurers bind themselves to pay in proportion any expense incurred, whenever such expense is reasonably incurred, for the preservation of the thing from loss, in consequence of the efforts of the assured or their agents. It is all one, whether the labour is by the assured or their agents themselves, or by persons whom they have hired for the purpose, but the object was to encourage exertion on the part of the assured; not to provide an additional remedy for the recovery by the assured, of indemnity for a loss which was by the maritime law a consequence of the peril. In some cases the agents of the assured hire persons to render services, on the terms that they shall be paid for their work and labour, and thus obviate the necessity of incurring the much heavier charge, which would be incurred if the same services were rendered by salvors, who are to be paid nothing in case of failure, and a large remuneration proportional to the value of what is saved in the event of success. I do not say that such hire may not come within the suing and labouring clause. But that is not this case. The owners of the *Texas* did the labour here, not as agents of the assured, and being to be paid by them wages for their labour, but as salvors acting on the maritime law, which as explained by Eyre, C. J., in *Nicholson v. Chapman*,² gives them a claim against the property saved by their exertions, and a lien on it, and that quite independently of whether there is an insurance or not; or whether, if there be a policy of insurance it contains the suing and labouring clause or not. The amount of such salvage occasioned by a peril has always been recovered, without dispute, under an averment that there was a loss by that peril; see

¹ 2 Arnould (5th ed.), p. 778.

² 2 H. Bl. 257.

Cary v. King; ¹ and I have not been able to find any case in which it was recovered under a count for suing and labouring. I do not much rely on this, for it is very likely that such counts often were in the declaration, and that therefore no inquiry was made whether the loss was recoverable under one count or another; but at least there is no authority for the position that salvage (properly so called) was recoverable under that count."

Lord Blackburn thinking that this clause gave no title to salvage or general average as against the insurer, moved the reversal of the judgment of the Court of Appeal, and the restoration of that of the Queen's Bench Division, and this motion was agreed to by the House.

In the course of producing a new edition of this work on the Law of Marine Insurance, falls on me the inevitable duty of examining the basis of this judgment of the House of Lords, which for the first time in this country, and for all future time, purports to ascertain and to determine the intention and effect of the *Sue and Labour Clause* of the English Policy.

THE
JUDGMENT
CONSIDERED.

The object, says Lord Blackburn, of this clause is so and so. With A distinction. deference, I will prefer to call it the intention of the clause. And that I may not appear to quibble with his lordship's words, let me at once point out that the object of the clause is plainly expressed, but that the intention of it, which the House of Lords were called on to determine, is a matter wholly of interpretation and construction.

As I have said, the terms in which the object is expressed are unambiguous, plain and perspicuous. "In case of any loss or misfortune," the object is, "the defence, safeguard and recovery of the said goods and merchandises, and ship, &c., or any part thereof." In the connexion in which the words recited stand, following immediately upon the enumeration of the perils, they are, I think, commensurate with those perils and with the largest intentions of salvage, beyond any room for reasonable question or doubt. It is not on these terms therefore by themselves, that Lord Blackburn could have founded his opinion. And taken in connexion with any thing else that appears, if he had allowed them any influence whatever, their effect must have been not to narrow, but indefinitely to enlarge the scope. I am therefore discharged at present from further considering these terms. The rest of the clause remains to be looked at. It is in these words:—"It shall be lawful for the assured their factors, servants and assigns to sue labour and travel for in and about," the expressed object, "to the charges whereof we the assurers will contribute, &c."

The expressed
object of the
Clause.

The words to
be construed.

Looking at these terms as the basis of the judgment, I think the way in which his lordship has arrived at the opinion expressed by him must have been this. The *sue labour and travel*, whatever these terms may mean, is the thing to be estimated in money and paid for by the assurers. The thing thus estimated in money is to be done by the assured their factors servants or assigns. It is as contradistinguished from salvors, that mention is here made of the assured, their agents and servants whose personal exertion

Lord Black-
burn's view
stated.

¹ Cas. t. Hardw. 304.

therefore, whose hand labour is here bespoke by the assurers in return for their promise to cover with their contributions whatever expense may be incurred in paying day's wages. These wages, and that toil, being taken as going to the very limit of the authority conferred by the words in question, become in effect the measure of the object contemplated, and thereby determine the whole intention of the clause.

Two things
involved in
that View.

If this statement fairly represents the unexpressed reasoning involved in Lord Blackburn's judgment as the entire basis of it, there are two things implied in that reasoning, so essential to its value that neither of them can be negatived without destroying the validity of the judgment. They are these:—First, that day labour, bodily toil, is the full and fair equivalent of the *sue labour and travel* of the clause:—And, secondly, that the *sue labour and travel*, or the thing intended by these words, is necessarily the thing intended to be estimated in money and charged upon the contributions of the assurers.

The sole Judicial
Function
in this case.

It must never be forgotten that the whole of this is a question upon the construction of words. Now, in the portion of the clause under present consideration, there are no terms involving any difficulty about their meaning except three; and these three are "sue, labour and travel." I think upon these hang all the law and effect of this clause.

THE DIFFI-
CULTY.

The words employed, taken severally and apart from the combination in which they are found, are simple, and intelligible; so much so, that the mind at a glance rushes on to seize the combined effect of the three terms, and is ashamed to find itself baffled. The mind returns upon the words singly; it scrutinises each with no addition to the sense apprehended before; and again it is unwillingly obliged to confess itself baffled by the combination.

The rule of construction that assigns to every word a several purpose severally expressed elsewhere in the clause or averment [*reddendo reddenda singula singulis*] is here inapplicable,—for other reasons,—but, suffice it to say, for this, that two of the terms, though differing in form appear to be identical in sense. *Travail*, say our Dictionaries, means labour. We therefore have in the clause *labour and labour*; and it is this duplication of the sense by the use of the two terms, that is, at the outset, the baffling part of the clause. By what means Lord Blackburn was able to justify to his own mind the reduction of these two terms to signify no more than that which is the humblest sense of either of them, taken singly and apart from any combination or context, is what I cannot discover. It would have been more satisfactory to others, if he had condescended to express his method and to state his means of solving this manifest difficulty. It is a difficulty; and solve that difficulty he must; or, by imposing *sub silentio* a sense that is not an interpretation of the terms, and therefore not a solution of the difficulty, he comes under a very heavy responsibility as a judge.

THE IDIOMATIC
CHARACTER OF
THE PHRASE.

I am at a loss to understand how the House of Lords could escape the conviction that this singular combination of well-known words, found in an ancient document, framed to govern the business of life, in some of the most important relations formed for the purposes of commerce, is a phrase that must have been in idiomatic use with Englishmen of all classes to express a meaning which no other combination of words at the time could so well

convey. And if some such suspicion as this did cross, as I think it must have crossed, the minds of the peers as of any educated man, it is not for me to explain why the House, with large opportunity and means of inquiry, did not think it their duty to ascertain whether any such usage had prevailed in the language at some such period in English history as would account for the phraseology appearing in this instrument, and at the same time reveal its meaning and effect.

That which was left wanting, by the parties outside the bar of the House or by the Peers within it, I shall proceed to supply, by evidence of the existence of such an idiom, as we find in the phraseology of this clause, in daily use with all classes of the English people, at a period of our history and amid circumstances every way consonant with the supposable and probable origin of the English policy, in a well defined and fixed sense, in perfect congruity with the expressed object of the clause, and in painful dissonance with the intention imposed upon it by Lord Blackburn and by the House.

EVIDENCE OF
THIS IDIO-
MATIC USAGE.

Travail about the year 1380, and for some time afterwards, appears to have been used for that bodily exertion which at this day we designate by *labour*; and accordingly in Wycliff's translation, made about that time, of the New Testament, it is to be found in every passage in which we find *labour* in King James's version.

About the same time or a little later, there is a use of the term *labour*, and also of *sue and labour* which is singularly idiomatic, was generally known to all classes, and was peculiar to what is but a brief period in the history of the nation. That period so far as my evidence goes, perhaps as far as any evidence now known goes, is included between the years 1422 in the reign of Henry VI., and 1509 which terminates the reign of Henry VII. This period is covered by the collection known as the *PASTON LETTERS*. It is in them, with one remarkable exception, that my evidence is to be found. In adducing that evidence, I must with a view to the economy of space, confine my extracts mainly to a single sentence in each instance, recommending those, whose curiosity may lead them, to consult the Letters themselves. As the letters and documents are numbered seriatim throughout the three volumes in Mr. Gairdner's edition which I am using, I shall cite them by the numbers.

Thus,—No. 856 is a Letter from the Prior of Bromholm to John Paston. Part of it is this:—"Please it youre maistership, for as moch as it is moved on to the my good maisters, the counsell of the Duche of Lancastr, that they be weel-wylling to make laboure on to my Sovereign Lady the Queen at your good instance for certeyn timber toward my dortour at Bromholm, &c."

No. 113, William Wayte [clerk to Mr. Justice Yelverton] to John Paston. In it he says:—"Sir Borle Jonge and Josse labour sore for Heydon and Tudenham to Sir Wilem Oldhall [speaker of the Commons] and profr more thanne to [two] thousande ponde for to have hese good Lordshap."

No. 132, Sir John Fastolf to Sir T. Howys [parson of Castlecombe]:—"It is lyke that grete labour and special pursute shall be made to the lord Scalys that he wolle meynteyn Tudenham and Heydon in all he can or may. Wherfor such persons as have founde hem [themselves] soore greved by extorcion as I have ben, and have or wolle have processe before the Commissioners [of

Oyer and Terminer at Lynne] they must effectually labour to my Lord Oxford and to my brother Yelverton, Justice [to have justice equally administered] or the poor people of Norfolk and Suffolk will be destroyed."

No. 154, Same to Same:—"Labour to the Sheriff for the return of such panels as will speake for me and not be shamed, for grete labour will be make by Wentworth's party. Entreat the Sheriff as well ye can by reasonable rewards rather than fail."

No. 133, Same to Same:—"especially labour the jury by whom office is [supposed to have been] found [affecting property of Sir John's] that they appear and certify my Lord of Oxford and Justice Yelverton that they were not privy therto."

No. 472, Margaret Paston to John Paston her husband. By way of giving a hint to her husband, at that time in pursuit of objects of importance to him, she relates the following conversation, which I give in modern spelling, her own being somewhat difficult to follow:—"He said by his faith he knew where a man was that laboured to him for a matter a right long time, and alway he besought him that he would labour it effectually, but though he sued to him, he could never remedy get of his matter; and then when he thought he should no remedy have by suing to him, he spake with Fynys (Say) that is now Speaker of the Parliament and prayed him that he would do for him in his matter and gave him a reward; and within right short time after his matter was sped."

No. 753, Sir John Paston to John Paston. He complains that he is not kept informed of several things:—" . . . nor off my Lord and Lady of Norfolkes comyng to London, at whoys comyng sholde be the chief labour and sewte that I or any for me sholde labor. . . . The Marchall and Counsell heer have wrytyn to my Lord Lieutenant for me and moorover desyrd both the Master of the Rollys and Sir T. Montgomerye to remember my maters both to the Kynge and to my lorde in so moche that, if the season be convenyent, both the said Master and Sir T. Montgomerye will labore both the Kynge and my lorde to entrete my Lord of Norfolk, my lady his wyff, and ther counsell, to do for me all that reason wyll." . . . The writer then requests "that I may hastyly heer from yow, and iff it come to that any mony must be givyn to my Lord or Lady of Norffolk ffor a pleeyr herfor, I will come to yow in all hast possible."

No. 275, John Bocking [an agent and retainer] to Sir John Fastolf. Speaking of Margaret of Anjou Queen to Henry VI. in the peculiar language of the time, the writer says this:—"The Quene is a grete and stronge labourid woman, for she spareth noo payne to sue hire thinges to an intent and conclusion to hir power."

No. 889, Alice, Lady Fitzhugh to John Paston. This lady's daughter was the wife of Francis Viscount Lovell, one of the principal adherents of Richard III. Lord Lovell therefore had been attainted after the accession of Henry VII., and was at the date of this letter in hiding.

Lady Fitzhugh says:—"Also my doghtyr Lovell maketh grete sute and labour for my son hir husbonde. Sir Edward Franke hath been in the North to inquire for hym; he is comyn agayn, and can nogth understonde where he is. Wherefore her benevolers willith hir to continue hir sute and labour."

The above instances I have taken almost at random from the Paston

Letters.¹ For that which follows, I am indebted to Mr. Gairdner's *Life of Richard III.*, cited at p. 26 of his volume, where the reference to the original document is given as MS. Cott. Julius B. XII. 317.

In 1471 Warwick, the Kingmaker, had fallen in the battle of Barnet. The Countess his widow seems to have fled to Sanctuary at Beaulieu in Hampshire, a fact confirmed by two several passages occurring in the Paston Letters, and in the same year she appears to have petitioned parliament for restitution of her inheritance. The extract given by Mr. Gairdner from her petition is in these words:—"In the absence of clerks she hath written letters in that to the King's Highness with her own hand, and not only making such labours suits and means to the King's Highness, sothely also to the Queen's good grace, to my right redoubted Lady, the King's mother, to my Lady, the King's eldest daughter, to my Lords, the King's Brethren, to my Ladies, the King's sisters, to my Lady of Bedford, mother to the Queen, and to other ladies noble of this realm."

This evidence speaks for itself and requires no summing up. Here we have *labour* by itself, *sue and labour*, and *suits labours and means*. The first and second being forms for swift use to meet the purposes of daily life are more frequently met with. But when a great and unfortunate lady means to sum up the detailed exertions imposed on her by misfortune; or, when the largest authority is to be given for exertions in the midst of contemplated misfortunes and loss as in this policy; the threefold phrase is resorted to.

EFFECT OF THE
EVIDENCE.

The term *means* used by the unfortunate Countess of Warwick is an admirable translation of *travail*, the third of the terms in the policy. The diplomatic use of the other terms in the phrase is quite determinate in sense, quite indefinite in extent; they are applied to the exerted persuasion of a King and of a Queen: and the only thing not designated by this twofold phrase, *sue and labour*, is the daily toil spoken of by Lord Blackburn as the element that determines the outcome and result of his judgment.

Again, money is mentioned in some of these letters; twice in relation to the Speaker of the Commons, once in relation to my Lord of Norfolk and his wyff, twice in respect of the High Sheriff of the County, as persons who were to receive. In no case were the receivers the persons who laboured. Money is a part, so well understood, of the diplomatic labour intended, that it is only through excessive eagerness it ever comes to be expressly named. The persons who hold the desired benefits in their hand, the *salvors*, are the objects at once of the labour and of the money.

It comes therefore to this, that, by the idiomatic use of these words, at a time when they constituted a homely phrase familiar in the mouths of all classes, the two essential propositions that form the basis of Lord Blackburn's judgment are each negatived as absolutely untrue in fact. Day

The Lords' Judgment contradicted by the proper sense of the Terms of the Clause.

¹ The edition of these Letters which I have used is the recent one published under the care of Mr. Gairdner of the Public Record Office, as one of the series of the Arber Reprints. In this edition the Letters and documents are numbered *seriatim*

throughout the three volumes, and I have in each instance cited the Letter by the number. I subjoin a list of other numbers which I have not cited:—700, 466, 274, 272, 249, 243, 232, 218, 129, 119, 108, 106, 63, 42.

labour or bodily toil is not at all the equivalent of *sue labour and travel*. The thing intended by the words *sue labour and travel* is not at all the thing to be estimated in money and charged on the contributions of the assurers. Salvage, and general average is but another name for it,—Salvage is the thing contemplated as the object of the *labour or sue and labour* in every passage of the Letters where the phrase occurs; salvage under circumstances of desperate difficulty, of distress, misfortune, or loss under which the helpless victims can but *sue and labour*, apply, solicit, and make supplication to those who are able to help them; salvage under circumstances in which it must be gained by influence, and obtained by money. Any other meaning is not the meaning of the authors of this policy. Any judgment based upon any other meaning is a miscarriage of justice and something worse.

**HISTORY OF
THIS IDIOMAT-
IC USAGE.**

It is a curious fact in the history of this English phrase, that it was so short-lived. It flourished, if it did not come into being, in the reign of Henry VI. It lived throughout the reigns of Edward IV. and Richard III., and probably of Henry VII., but not beyond the year 1509. Such of the English works and Letters of Sir Thomas More as I have seen are destitute of any trace of it. And although one expecting such a thing might think that he met with the remains of the phrase in new combinations in Robinson's translation of More's *Utopia*, 1551-55, and in Roper's *Life of his father-in-law*, Sir T. More, written about the same period, yet that is very doubtful; and certainly no first impression of the existence of such a phrase could be derived from either of these productions.

**DATE OF THE
ORIGIN OF THE
ENGLISH
POLICY.**

Did the inquiry, here pursued, concern the date of the origin of the instrument in which this clause is found, I do not know what evidence more undesignated, less likely to deceive, closer and more convergent in point of time, or more cogent in effect, could be expected, than that which I have produced. To me, relying on the evidence furnished by the use and history of this popular idiom, it is clear beyond a doubt that the Lloyd's Policy, as we now call it, originated not later than the reign of Edward IV.; but I should say much more certainly between 1430 and 1455 in the time of Henry VI., say about 1450.

The Lombards were still in Lombard Street in 1455; for in that year it is stated, in the *Polychronicon* printed by Caxton in the time of Edward IV., that the apprentices rose against them and rifled many of their houses. The next day the common people were arming privately to support the apprentices, "and the comyn bell, callyd the Bow bell was to have been rongen," but for the interposition of "certayn sad men." I cannot doubt if we strike out of the Lombard Street clause in the policy, as we now have it, such modern interpolations as "heretofore," "Royal Exchange or elsewhere in London," we read in the remaining language of it the feelings of jealous rivalry and bitter pressure in which originated "this writing or policy (a foreign word, Italian, Lombardian, forced upon the makers of this new writing)," to be "of as much force and effect as the surest writing (the English word) or policy (foreign again) of assurance made in Lombard Street [the haunt of these foreigners]."

**FURTHER HIS-
TORY OF THIS
IDIOMATIC
USAGE.**

It is a more curious fact, as fact I believe it to be, that the singular phraseology of the Sue and Labour Clause, is not to be found in what may be called the contemporary literature of the times covered by the Paston

Letters. I have turned over theological treatises, chronicles, translations, and the collection of Caxton's Prefaces, together with the *Ultimus Liber* of the *Polychronicon* to be found in Mr. Blade's Vol. II. of the *Life* of Caxton, without coming upon a single instance of this idiomatic use. Of course its existence contemporary with these very treatises is now put beyond a doubt. That however was the dearest period, says Mr. Hallam, in the whole history of English literature. Something of this is evident on the pages of these treatises. The facility of writing does not exist. Style is wanting. The idiomatic verve of the Paston Letters seems, in the case of these authors, to have been touched with torpor at the very notion of writing for the public. The productions therefore, in point of style, are rather of the class of school-boy compositions feebly essayed in the pursuit of skill and power in his own or a foreign language.

In these curious circumstances, any contemporary evidence of the use and meaning of this phraseology, other than is supplied by the English policy, was probably not known to be in existence, from and after the year 1509 when Henry VIII. came to the throne, until the first two volumes of the Paston Letters were issued from the press by Fenn under George III. in 1787. So that had the same question upon salvage under the Sue and Labour Clause cropped up in any of our Courts during that long interval of 270 years, it is difficult to say what would have been the result. The darkness could not have been more dense than was recently exhibited, the publication of the Paston Letters notwithstanding. But then, there would have been no foregone conclusions derived from American sources. And there might in that case have been some consideration found, some regard had for the practice of fourteen generations of men, insurers and assured, under this clause; a practice ever before their eyes in making the contract, never swerved from, when the contract came to be performed; a practice which when it began was contemporaneous with the existence of the phrase as a living idiom, and which, though it survived the loss of that idiom from the living tongue for nearly four centuries, continued through all that tract of time uniform and identical, the traditionary sense of the clause, if not the obligatory law of the contract.

At this point, I have thought it better to break off, notwithstanding I had gone on to an examination of the reasoning and the method which obviously underlie the observations of Lord Blackburn in respect of the intention of the clause. For as in my view, and I think I could have fully justified it, that reasoning, considered from Lord Blackburn's point of departure, is false, and the method by which he arrived at his conclusion a complete inversion of the procedure of right reason, I feared that such an examination might convey to other minds an impression, perfectly alien to my own thoughts, of disrespect for Lord Blackburn and the other eminent judges who concurred with him.

I must, however, with the greatest deference, venture to point to the perfunctory brevity, with which Lord Blackburn performs the heaviest and most difficult part of his duty, namely, the interpretation and construction of the clause. He says, "I think that general average and salvage do not come within the words of the suing and labouring clause." This is all. It seems incredible that in the Court of final appeal, when reversing the judgment of the Lords Justices of Appeal, there should be nothing more. Surely,

anything equally jejune and unsatisfactory has never proceeded from any Judge or Court, since the days when Lord Ellenborough and his colleagues were wont to certify their opinion into Chancery on issues sent to them from the Lord Chancellor, and to decline to do more; an unsatisfactory practice which Lord Brougham, in the case of Lord Ellenborough, condemns, with severe expressions of regret that it had ever been introduced. In other cases, it would involve a heavy loss to the public and the bar. In any case, it implies a draft at sight upon public confidence which no man that ever lived would be entitled to make, and no man perhaps ever makes without injury to himself. In this case, compliance with the practice of rendering a reason for the construction adopted, would, I hope, have been beneficial by leading to further delay, and to inquiry; but, in the form which it takes in Lord Blackburn's judgment, it engenders the irrepressible suspicion that we owe the decision to the invincible courage of this eminent judge.

CHAPTER III.

EXCEPTED LOSSES.

Under the memorandum -	- 817	to be free of seizure -	- 839
meaning of -	- 818	in port of discharge -	- 839
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Other exceptive warranties -	- 838	and of the consequences -	- 842

BEFORE proceeding to consider more at large the subject of general and particular average, total and partial losses, and the doctrine of adjustment, we will advert to certain risks and losses which are excepted from the policy either by the common memorandum, or by other express stipulations of less frequent occurrence.

Amongst the commodities which are the subjects of marine insurance, it is obvious that there are many which are liable to be deteriorated in a much greater degree than others by the effect of the perils insured against, *e. g.*, the same quantity of sea water will damage one article 50 per cent., and another only 10 per cent.; a month's delay will hardly affect one description of goods, and may entirely spoil another.

Of the common memorandum.

There are, also, many articles of a perishable nature with regard to which it is difficult to discover how far their deterioration is owing to the direct operation of sea perils for which the underwriter would *prima facie* be liable, and how far to that inherent decay and internal decomposition for the effect of which he is not responsible.

In order to avoid the difficulty of adjusting the rate of premium on such commodities to the risk run, and to escape

being harassed with claims for partial losses of trivial amount, or partial losses which are both considerable in extent, and in the majority of instances due entirely to inherent vice, the underwriters in almost all countries where the practice of marine insurance prevails have introduced clauses into the policy, by which they stipulate that upon certain enumerated articles of the most perishable nature, and of very frequent import and export, they will not be liable for any amount of sea damage (*average*) short of total loss; upon others less perishable, that they will not be liable unless the damage amounts to a certain percentage on their cost, or value in the policy.¹

The policies of all states contain similar clauses.

The policies of all mercantile states contain stipulations, introduced with this object, which vary greatly both in respect of the articles enumerated and the amount or percentage at which the liability of the underwriter commences. The stipulation in use in this country, which was first introduced about the year 1749,² is generally called the *common memorandum*, and the articles enumerated in it are called *memorandum articles*. In the policy used at Lloyd's, being now the statutory form, it is as follows :

Form of the common memorandum in use at Lloyd's.

(1) Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded.

(2) Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent.

(3) And all other goods, also the ship and freight, are warranted free from average under three pounds per cent., unless general, or the ship be stranded.

Meaning of terms.

The language of this stipulation is evidently very

¹ See the judgment of Lord Alvanley in *Dyson v. Rowcroft*, 3 B. & P. 474, 476; *Benecke, Pr. of Indem.* 464, 465; *Stevens on Average*, 219; 4 *Boulay-Paty, Droit. Mar.* 87.

These percentages are not to be confounded with the one per cent. loss for which insurers on the continent

since the earliest practice of marine insurance never have been held liable; *Kuricke de Assecur.* no. 8; *Loccenius, lib. 2, c. 5, s. 15*; 4 *Boulay-Paty, Droit. Mar.* 510.

² 1 *Magens*, 2, 10. See also *Boyfield v. Brown*, 2 *Str.* 1065.

ambiguous, and a great variety of questions have arisen as to its construction.

The first question is, what is included under the words by which the enumerated articles are described in the first and second clauses.

As to this, it has been decided in this country that the word *corn* includes malt,¹ peas and beans,² but not rice;³ and that the word *salt* does not include saltpetre.⁴

In the United States it has been decided that *hides* and *skins* do not include furs,⁵ and that the specification of one description of an enumerated article, as dried fish, excludes all other descriptions of the same, as pickled fish;⁶ so, also, where the word *roots* was among the enumerated articles, it was held not to include sarsaparilla, because it is not liable to decay by sea damage.⁷ In the United States.

The next question is as to the meaning of the words "warranted free from average." "Warranted free from average."

The ambiguity here chiefly arises from the use of the word *average*, as to the various meanings of which we shall have more to say elsewhere. As here used it has two different and distinct meanings, according as it stands alone, or is coupled with the word *general*. As it stands alone, it means partial damage to the subject of insurance by any of the perils insured against; and the purport therefore of the words "warranted free from average," is that the underwriter, as to the articles enumerated in clause (1), stipulates to be free from liability for any extent of deterioration, which does not amount to a total loss. And as to the articles enumerated in clause (2), and in clause (3), he makes the same stipulation as to damage which does not amount to 5 per cent., or 3 per

¹ *Moody v. Surridge*, 2 Esp. 633.

² *Mason v. Skurry*, 1 Marshall, Ins. 223; 1 Park, 245, 253.

³ *Scott v. Bourdillon*, 2 B. & P. N. R. 213.

⁴ *Journu v. Bourdieu*, Marshall on Ins. 216; 1 Park, 245.

⁵ *Bakewell v. United Ins. Co.*, 2 Johnson's Cases, 246.

⁶ *Baker v. Ludlow*, 2 Johns. Cas. 289.

⁷ *Coit v. Commercial Ins. Co.*, 7 Johnson's Rep. 385.

cent. respectively of their cost, or insured value; it being understood that in any of the three cases whensoever the loss is such as to be payable by him, he engages to pay the full amount.¹

In point of fact, therefore, an insurance upon the articles warranted free from average in clause (1), is equivalent to an insurance against their total loss only, including, however, in that term a constructive as well as an absolute total loss.²

“Unless
general.”

The next question is as to the meaning of the words “unless general.”

It was on one occasion contended, that these words amounted to a condition that if a general average loss took place, then the underwriters were liable for partial loss also; but this, as might have been expected, was held not to be so, and it was decided that the true construction of the words “warranted free from average unless general,” was that the underwriter is exempted by the memorandum from liability for anything less than a total loss, except it be of the nature of general average. For a general average loss, *i. e.*, a loss voluntarily incurred to prevent a total loss of the general adventure, the insurer is liable, be it great or small.³ An expenditure on one subject of insurance to prevent a loss in respect of it, for which the insurer would be liable, may be recovered from him; so that if it be upon a subject which is free from average, *e. g.*, seed, and the loss resulting instead of being total, is partial, say 10 per cent., this partial loss falls on the assured, and the expenditure may be recovered against the insurer under the sue and labour clause.⁴ But if

¹ Per Lord Alvanley in *Dyson v. Rowcroft*, 3 B. & P. 474, 646.

² See *Adams v. MacKenzie*, 32 L. J. (C. P.) 92.

In *Carr v. Roy. Exch. Ass. Co.*, 33 L. J. (Q. B.) 63, this warranty was, “free from all average or claim arising from jettison or leakage, unless consequent upon stranding, sinking, or fire. The value of *l.* to be mu-

tually admitted on adjusting or deciding all claim for loss or particular average.” The assured recovered for an average loss, although there was no stranding, or sinking, or fire.

³ *Wilson v. Smith*, 3 Burr. 1550.

⁴ *Kidston v. Empire Marine Insurance Co.*, L. R. 1 C. P. 535; 2 C. P. 357.

the expenditure be to prevent a loss which would have fallen upon the assured, it is he that bears the expenditure.¹

Next, as to the words, "or the ship be stranded."

"Or the ship
be stranded."

It has been decided after much previous controversy, that these words must be read as though the clause were thus,—
"warranted free from average unless general, or unless the ship be stranded;" that is, if the ship be stranded the underwriters agree to be responsible for any loss by sea damage on the enumerated articles, however trifling the extent of deterioration may be, just as though no warranty to be free from average had been inserted in the policy.²

The reason of this is, that, as it is very difficult to ascertain in the case of stranding, whether the damaged state of the memorandum articles arose proximately from the stranding, or from the perishable nature of the commodities themselves, the parties, in order to avoid the difficulty of this inquiry, agree to consider the loss to have happened in consequence of the stranding (which is a peril insured against) and to be solely referable thereto.³

Reason of
introducing
them.

It has also been decided that the underwriters are thus liable, though the damage or deterioration in respect of which the claim is made be shown to have proceeded, not from the stranding itself, but from some other peril; thus, in the leading case of *Burnett v. Kensington* the facts were, that the ship, having sprung a leak by striking on a rock, was making so much water, that the captain, for the general safety, was obliged to run her on shore;—the cargo, which was fruit, "warranted free from average," was greatly damaged, but it was expressly found that the whole damage was caused by the leak, and none by the subsequent stranding

Loss need not
arise from the
stranding.

¹ *Great Indian Peninsular Ry. v. Saunders*, 30 L. J. (Q. B.) 218; 31 L. J. (Q. B.) 206; *Booth v. Gair*, 33 L. J. (C. P.) 99.

² *Burnett v. Kensington*, 7 T. R. 210, confirming *Canillon v. London Ass. Co.*, cited 3 Burr. 1553, and *Browning v. Elmalie*, cited 7 T. Rep.

216, and 4 T. Rep. 783, and overruling as to this point, *Wilson v. Smith*, 3 Burr. 1550.

³ Per Lord Kenyon, in *Nesbitt v. Lushington*, 4 T. Rep. 783; in *Burnett v. Kensington*, 7 T. Rep. 222, 224.

—the Court, after two arguments, and the most mature deliberation, held the underwriters liable for the average loss on the cargo, notwithstanding the memorandum.¹

The reason that mainly influenced the Court in their decision was, that by determining that the assured could only recover for loss occasioned by the stranding, they would let in all the doubt and difficulty as to the causes of the loss which the introduction of the exception “unless stranded” into the memorandum was intended to remove.²

In this case of *Burnett v. Kensington* it will be observed, that the stranding, though subsequent in point of time, was yet in some degree connected with, in fact was necessitated by, the very peril that caused the damage to the cargo. It has been a question in the United States, whether the underwriter is liable, if the stranding take place in one part of the voyage, and the cargo be not damaged until a subsequent part of it, by a cause wholly unconnected with the prior stranding.³ This, however, is a point on which no doubt can, I apprehend, be entertained in English law, it being distinctly admitted by Mr. Justice Grose as a consequence clearly following from the decision of the Court in *Burnett v. Kensington*, “that, if a ship be stranded and the cargo suffers no damage whatever, and afterwards the ship meets with bad weather, and the cargo sustains an average loss, say, of 90 per cent., the underwriters are answerable for the whole of that average loss,” though no part may have happened in consequence of the previous stranding.⁴

Provided the
goods be then
at risk.

Where, however, the stranding takes place after the memorandum articles have ceased to be at risk, as where they were landed and sold at Rio in the course of the voyage, and the stranding took place subsequently off Bordeaux, the port of destination, this does not render the underwriter liable for an average loss sustained by them in the course of the voyage; for the stranding contemplated by the memorandum

¹ *Burnett v. Kensington*, 7 T. Rep. 210.

² 2 Phillips, Ins. no. 1761.

³ Per Grose, J., in *Burnett v. Kensington*, 7 T. Rep. 224.

⁴ See per Grose, J., 7 T. Rep. 224.

must be one which takes place after the adventure on the memorandum articles has commenced, and before it has terminated.¹

It has also been decided that the words "or the ship be stranded" are exclusively confined to the stranding of the ship, and that the stranding of a lighter, in which goods are being conveyed from the ship to the shore, is not within the exception.²

The meaning of the memorandum therefore, is—

1. That all losses, in the nature of general average, are to be paid by the underwriter as though the policy did not contain the memorandum :

2. That the underwriter is liable for no particular average losses, or for none under the rates specified, unless the ship be stranded :

3. But that if the ship be stranded while the memorandum articles are on board, then the underwriter is liable to pay all particular average losses, whether caused by the stranding or not, just as though the memorandum did not exist.

It is obviously, therefore, of great importance to ascertain when a ship is considered "to be stranded," within the meaning of the memorandum.

The term stranding is very badly chosen, and has given rise to a variety of decisions which, in the language of Lord Ellenborough, "display a curiosity not at all creditable to the law."³ The following appear to be the principal points determined as to what constitutes a stranding within the meaning of the memorandum.

What is a stranding within the memorandum.

1. If, as Lord Ellenborough says,⁴ "it be merely touch and

¹ *Roux v. Salvador*, 1 Bing. N. C. 526; *S. C.* in error, 3 Bing. N. C. 266, 276.

² *Hoffman v. Marshall*, 2 Bing. N. C. 383; 2 Scott, 504.

This attempt to subrogate the lighters into the contract in place of the ship was resisted on another

point, viz., the warranty of seaworthiness; *Lane v. Nixon*, L. R. 1 C. P. 412.

³ Per Lord Ellenborough in *M'Dougle v. Royal Exch. Ass. Co.*, 4 Camp. 283, 284; 4 M. & Sel. 503.

⁴ *Id.* 4 Camp. 383.

1. There must be a settling of the ship for a time.

go" with the ship,—if, that is, she merely touches on the obstructing object (whether rock, bank, reef, or of whatever other nature) without remaining fixed upon it for some space of time, that will not constitute a stranding; if, on the other hand, she settles down on it in a quiescent state, it will.¹ The amount of damage sustained by the ship has nothing to do with the question of stranding or no stranding.²

Thus, where a ship ran aground on some piles, placed in a river bed about nine yards from the shore, in order to keep up the banks, and there rested till they were cut away, this was held to be a stranding.³ A ship was proceeding down a tidal river when the wind suddenly took her ahead, and she went ashore stern foremost on the mud bank of the river. There she remained fast for about two hours, till the tide flowed, when she got off and proceeded on her voyage; it was not found that she had sustained any injury. Lord Ellenborough held that this was a stranding:—he says, "It is not merely touching the ground that constitutes stranding. If the ship touches and runs, that circumstance is not to be regarded. There, she is never in a quiescent state; but if she is forced ashore, or driven on a bank, and remains for any time on the ground, this is stranding, without reference to the degree of damage she may thereby sustain."⁴ So, where a ship was driven by a current on a rock, and remained fixed there from fifteen to twenty minutes, it was held a stranding.⁵

But, where a ship coming out of a harbour struck on a rock, fell over on her beam ends, and after remaining so for a minute and a half floated off and proceeded on her voyage, Lord Ellenborough held that this was no stranding. "To use a vulgar phrase which has been applied to this subject, if it is 'touch and go' with the ship there is no

¹ *Dobson v. Bolton*, 1 Park, Ins. 239; *S. C.*, *Bolton v. Dobson*, 1 Marsh. Ins. 231; *Harman v. Vaux*, 3 Camp. 439; *Baker v. Towry*, 1 Stark. 436; *McDongle v. Royal Exch. Ass. Co.*, 4 Camp. 283.

² *Harman v. Vaux*, 3 Camp. 429.

³ *Dobson v. Bolton*, 1 Park, Ins. 239; 1 Marshall, Ins. 231; 2 Phillips, Ins. no. 1758.

⁴ *Harman v. Vaux*, 3 Camp. 429.

⁵ *Baker v. Towry*, 1 Stark. 436.

stranding. It cannot be enough that the ship lay for a few moments on her beam ends. Every striking must necessarily produce a retardation of the ship's motion. If by the force of the elements she is run aground and becomes stationary, it is immaterial whether this be on piles or on rocks by the sea shore; but a mere striking will not do, wheresoever that may happen."¹ When the case came before the full Court, his Lordship said, "I take it that stranding in its fair legal sense implies a settling of the ship—some resting or interruption of the voyage, so that the ship may *pro tempore* be considered as wrecked: from which misfortunes a great deal of damage does frequently occur."²

In the case of *Baring v. Henkle*, A.D. 1801,³ Lord Kenyon held that a ship in a tidal river that was fouled and driven on a bank, where she remained an hour, was not stranded. This decision cannot now be deemed to be of any authority.⁴

2. Another important test is to ascertain whether the ship took the ground in the ordinary course of the navigation, or in consequence of some unusual and unexpected calamity.

2. Not where the ship takes the ground in the ordinary course.

"Where a vessel takes the ground in the ordinary and usual course of navigation and management in a tidal river or harbour, upon the ebbing of the tide, or from natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered a stranding within the memorandum."⁵

A vessel, under the care of a pilot, while being taken up Cork river twice took the ground from shallowness of water, and remained aground, on the first occasion eight, and on the second occasion, ten hours. She was each time floated off by the tide, and afterwards at high water was moored to a quay

¹ *M'Dongle v. Royal Exch. Ass. Co.*, 4 Camp. 283; *S. C.*, 4 M. & Sel. 503.

² *Id.* 4 M. & Sel. 505.

³ *Baring v. Henkle*, 1 Marsh. Ins. 232.

⁴ Per Taunton, J., in 3 B. & Ad. 27; per Lord Campbell in 1 E. & B. 460.

⁵ Per Lord Tenterden in *Wells v. Hopwood*, 3 B. & Ad. 34.

in Cork harbour; on the tide ebbing she fell over on her side, and lay on her broadside for two whole tides, by which the ship and cargo (which was warranted free of average) were much damaged. Taking the ground in the manner mentioned appeared in evidence to be no more than was usual with all vessels of the same class in the Cork river; therefore this was held not to be a stranding within the memorandum.¹

So, where a vessel in a tidal harbour was moored in the place indicated by the harbour-master, and, upon the tide ebbing, took the ground in the precise spot where it was intended she should, but, in so doing, struck on some hard substance, whereby her bottom was damaged, this was held not to be a stranding, but a mere taking the ground in the ordinary course of the navigation.²

3. Unless it be through some accidental occurrence or extraneous cause.

3. "But where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event is a stranding within the meaning of the memorandum;"³ or, as Tindal, C. J., expresses it, "where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of the navigation in which the ship is engaged, either wholly or in part, but from some accidental or extraneous cause, that is a stranding."⁴

A pilot, contrary to the warning of the captain, and in his absence, fastened a ship by a rope to the pier of St. George's dock basin, where the dock-master told him she would not lie safely. Soon afterwards the ship took the ground astern, and, the tide ebbing, the rope broke, and she fell over on her side, and was much damaged. The Court held that this was clearly a stranding, the ship having been taken out of the

¹ *Hearne v. Edmunds*, 1 Br. & B. 388.

² *Kingsford v. Marshall*, 8 Bing. 458. See per Parke, J., in 3 B. & Ad. 29; and *S. P.*, in *Magnus v.*

Buttmer, 11 C. B. 876.

³ Per Lord Tenterden, 3 B. & Ad.

34.

⁴ 8 Bingh. 464.

usual course, and improperly moored in the place where the accident afterwards happened.¹ The decision was the same where a ship took the ground in Boulogne harbour, and had her knees broken by a heavy swell running into the harbour.²

While a ship was in Wisbeach river or canal, the water was drawn off, and the ship accidentally settled down on some piles not previously known to be there. This was held to be a stranding, for "we cannot suppose," says Abbott, C. J., "that these canals are so constantly wanting repair as to make the drawing off the water an occurrence in the ordinary course of the voyage."³

A ship, on entering a tidal harbour, struck the fluke of an anchor, and being afterwards moored in deep water was found to be in danger of sinking. For this reason she was warped further up the harbour, where she took the ground and remained fast. This was held to be a stranding, for, said Bayley, J., "the ship, in this case, was laid on the strand, not in the ordinary course of navigation, but *ex necessitate* to avoid an impending danger."⁴

A ship necessarily in a harbour dry at every tide, was moored where ships of her burthen usually lay, and in addition, it was necessary to lash her by a rope fastened round her masts to posts on the shore; when the tide ebbed, the rope, of insufficient strength, broke, and she fell over and was stove in. This was held to be a stranding; the falling over being a consequence of the accidental breaking of the rope.⁵

A ship in a tidal harbour was, through the stretching of a rope a-head, moved somewhat astern by the wind, so that the forepart, instead of settling in the mud, got upon a heap of rubbish, whereby, as the tide ebbed, she became strained, and let water through her seams, thus damaging a cargo of fruit warranted free of average. It was held by the majority

¹ Carruthers v. Sydebotham, 4 M. & Sel. 77; and see the observations of Taunton, J., on this case, in 3 B. & Ad. 25.

² Fletcher v. Inglis, 2 B. & Ald. 315.

³ Rayner v. Godmond, 5 B. & Ald.

225.

⁴ Barrow v. Bell, 4 B. & Cr. 736; S. C., 7 Dowl. & Ryl. 244. So Burnett v. Kensington, 7 T. R. 210.

⁵ Bishop v. Pentland, 7 B. & Cr. 219; 1 Man. & Ryl. 40.

of the judges, that this was a stranding within the memorandum.¹

A ship, bound from Nantes to Dublin, was forced by stress of weather to run into the Bay of Palais, and there let go her bower anchors and chains. The gale increasing, and the ship dragging the large anchor, the master, to save ship and life, slipped chains, put the ship under sail, and ran for the tidal harbour of Sanzon. It was ebb tide when the ship entered it, and she took the ground and there she lay for a month, only floating eight times, and then on the top of spring tides. When she put to sea it was found that she had been strained and was making water, whereby her cargo was damaged. The Court of Queen's Bench held, that this was a clear case of stranding within the memorandum.²

The 5 and 3
per cent.
clauses.

The object of both the Five and Three per Cent. clauses is the same, viz., to protect the underwriter against trifling claims. The former, comprising articles more liable to sea damage than the general cargo, though not so perishable as those which, in the first clause, are warranted free from all average, stipulates that, with respect to them, the underwriter shall not be liable, unless the loss amounts to 5 per cent. The latter clause provides that, with regard to the general cargo, the ship, and the freight, he shall not be liable, unless the loss amounts to 3 per cent.³

It has not hitherto been pointed out, that the term *average* nowhere occurs in the body of the policy. No doubt we owe the policy to the Englishmen of the time of Henry VI.; but this particular term to Frenchmen of a later date. For the first time in the history of the written contract, parties to marine insurance are introduced to this term by the addition

¹ Wells v. Hopwood, 3 B. & Ad. 20. So, Letchford v. Oldham, 5 Q. B. D. 538.

² Corcoran v. Gurney, 1 E. & B. 456; 22 L. J. (Q. B.) 113.

³ The articles specified in the 5 per

cent. clause are generally called, together with those in the first clause, *enumerated* articles; the "other goods" included generally in the 3 per cent. clause, are called, the *non-enumerated* articles.

of the common memorandum about 1749. In the previous part of this treatise we have used the terms *loss* and *average* interchangeably as if they were synonymous; never, indeed, without something in the context to mark their legal relation to the insurer. But here at length the use of this term *average* becomes eminently critical, and the precise meaning and effect of it is necessarily pointed out, the better to clear from ambiguities the discussion forced upon us by the Courts, with a view to results that shall be acknowledged by all to be satisfactory.

Upon the construction of these clauses many questions have arisen, which may, however, all be comprised under two general heads, and the first of these is this,—1. How is the required amount of loss to be made up?

1. How the percentage is made up.

(1.) The first question that presents itself under that general head is this,—Can successive losses, happening at different times, be added together, so as to make the underwriter liable if their aggregate amount exceeds 5 per cent. or 3 per cent.?

Of successive losses.

This question, after a silence of half a century, has recently been agitated anew, and the three decisions, all that exist in relation to it, two of them being American authorities, have been reviewed in our Court of Appeal, and with this general result, that separate and distinct averages may be added together to make up the percentage for which the insurer is liable, provided they occur upon the same voyage.¹

Stewart v. Merchants' Mar. Ins. Co.

In 1828, in the United States, upon a voyage policy on ship,² Putnam, J., decided that distinct and successive averages were not to be added, and for that purpose that the damage from disasters happening at one time, or in one continued gale or storm, is to be considered by itself and as one average. Lord Esher³ objects to this reasoning, on the ground that it would apply to a storm lasting three days and

American cases. Putnam, J.

¹ Stewart v. Merchants' Mar. Ins. Pick. (Mass.) Rep. 259. Co., 16 Q. B. D. 619.

² 16 Q. B. D. 625.

³ Brooks v. Oriental Ins. Co., 7

nights, on the first of which if the ship were to graze a rock with injury to her keel, and on the second or third were to lose her mast, the two injuries would be as distinct as if they occurred in separate storms. In so saying the learned Judge errs, I think, in substance and in language, and departs from the terms of the insurance contract; the first, because the two injuries being assignable to only one cause make but one average; the second, because average is not cognisable except in its cause, and, therefore, in the policy, it is stipulated in the only possible way, that is, by relation to its cause.

Story, J.

In 1836 the same question arose before Story, J.,¹ on a policy on goods, not ship, as Lord Esher twice assumes it to be. This case, as Lord Esher says, being a foreign decision, is not to be regarded as an authority binding upon him, and consequently we are to consider it in relation to an English Court as a matter of opinion only, but an opinion on the part of so learned a Judge as Story, J. It is in this view a somewhat curious circumstance that Story, J., announces in the course of his judgment that he is of both opinions, both against and for the addition of averages; but, being obliged to give a decision, he ultimately declares for that one of them which allows of the addition of averages, and *ex necessitate* says the same words ought to have the same effect given them in their application to *ship*. Before, however, he had got that length, he reviewed the decision of Putnam, J., and says, I would have adopted the principles of that decision, and applied them to the case at bar, but my *distress* is that this is a policy on goods, and Putnam, J., excepts the case of goods from the effect of his decision as probably to be determined on other principles. In an English Court, therefore, this case is really of little or no value.

Blackett v.
Roy. Exch.
Ass. Co.

The only English authority is a decision of Lord Lyndhurst, C. B., and his colleagues in the Court of Exchequer in 1832, upon a voyage policy on ship, where it was held that averages were to be added.² This result was arrived at by the

¹ Donnell v. Columb. Ins. Co., 2 Sumn. 366.

² Blackett v. Roy. Exch. Ass. Co., 2 Cr. & J. 250.

application of a purely artificial rule of interpretation, a rule which is the frequent refuge of indolent Judges, and in 99 cases out of the 100 in which it is applied, the very expression, principle and power of human injustice. Lord Esher objects to the application of the rule in commercial cases, and he objects to Lord Lyndhurst as not being familiar with commercial law. This, one would expect, entirely disposes of the English authority. But it seems no; for by putting two decisions together, that by Story, J., and that by Lord Lyndhurst, each of them being already reduced to nothing, Lord Esher arrives at that something which is the addition of averages.¹

The case in which Lord Esher and his colleagues were called on to apply and to develop this principle was the case of a time policy on ship, the assured claiming to add all the averages occurring throughout the duration of the policy, say for twelvemonths. Lord Esher deeming a more reasonable limit desirable, decided to confine it to a separate and distinct voyage, which might, however, comprise stopping-places, stations or passages within its entirety.

*Stewart v.
Merchants'
Mar. Ins. Co.*²

The striking anomaly of this decision is that it puts it in the power of the assured to choose the voyage; and that voyage may be to go round and round and round the globe, putting in goods and putting out goods at ports in her course, until the policy and the twelvemonths are together exhausted. The supposed limit, therefore, is rendered inoperative at the pleasure of the assured and at the expense of the insurer; so that the modification which Lord Esher went so far to find, recklessly condemning this treatise for not suggesting it, proves to be a cheat upon the Court.

Anomalies of
the decision.

A second anomaly belongs to the rule itself, that, whereas the object of the memorandum is "to exclude small and trifling matters from the policy," as Lord Esher himself says, the rule allows these very trifles to be put up in quantities,

¹ A printer's blunder in the judgment makes Lord Esher say that the memorandum was introduced in favour of the *assured*; no doubt he

said in favour of the *insurer*; but the blunder neatly expresses the outcome of the judgment.

² 16 Q. B. D. 625.

and in this collective shape to be a good claim against the insurer; exactly, as if he paid losses as another man buys willows, by the bundle, or birch-brooms, by the hundred, indiscriminately, as though there were no causes to be investigated, or evidence required and to be sifted in every case of average however trivial. True, Lord Esher expressly mentions the need that both parties have for considering evidence: that is one of the seeming inconsistencies of this judgment.

A third anomaly also arising out of the rule is that it gives to the same term *average* two distinct, different, and irreconcilable meanings in the clauses of this same memorandum. For instance, remove the term *ship* from the 3 per cent. clause, and place it in the first clause which is, *warranted free from average*. The effect of that is that the policy is against total loss only, including a constructive total loss. At the end of a long and very unfortunate voyage under such a policy, the shipowner by adding together all the average losses sustained by the ship on the voyage, shows that they amount to a constructive total loss; why is his claim for this to be held bad? By this means it is by Lord Esher held good to make up the 3 per cent. claim. And remember that upon the supposed claim for a constructive total loss, the instant the last addition is made which tops the repaired value, the particular items cease to be average losses, they make up a total loss. Either the decision is wrong, or this claim is good. This is the inconsistency of error.

What the
Court should
have done.

It is matter for profound regret in a cause affecting so seriously the commercial community of Great Britain and her dependencies, the Court of Appeal instead of rejecting for wrong cause the decision of Putnam, J., and of adopting for no cause at all the decisions of Story, J., and of Lord Lyndhurst, did not on this the first occasion the question had come within appellate jurisdiction in England or America, inquire, surely their chief duty, and determine between the parties what was the meaning of their language, upon the effect of which it was that they had differed.

Root of this
erroneous
decision.

The root of all this difference and error is to be found in the term *average*, erroneously viewed as a general term, *nomen*

generale. As we use the terms *air*, *earth*, *water*, to designate indefinite masses in which whatever additions in kind may be made, those additions instantly lose all distinctive existence; such, it is assumed, is the general sense of the term *average* as here employed, which by reason of its foreign origin and unknown etymology seems to offer no repugnance to such an assumption. All this looseness of notion is struck from it the moment it is placed in relation to the doctrine and practice of marine insurance. The use of this term differs in different countries. In England the use of it has always been in one precise and definite meaning. It designates damage as the outcome of an event from which it takes origin and receives character and indestructible individuality, and by that composite nature it becomes average as known to marine insurance. The *average* named in the clause is by its very nature an individual event. We cannot speak of it, write of it, deal with it, except in this individual, ineffaceable character, without involving ourselves in difficulties, inconsistencies and absurdities. As well speak of a mass of human character as of insurance averages in the lump. It is subject to this sacrifice of propriety of language and thought, however, that I must go on to state the effect of this decision.

The result of this decision is that for the purposes of the Result.
3 and the 5 per cent. clauses of the memorandum, averages may be added to make up the percentage. In respect of ship such averages may be added as occur within the agreed voyage in a voyage policy, or, in case of a time policy, within a distinct separate voyage though comprising several passages in its entirety. In respect of goods, or freight, such averages may be added as occur during the voyage or any part of it on which and whilst these subjects of insurance are at risk.¹

¹ It does appear to me as the real ground of objection to the decision of Putnam, J., that the consequences would be so excessive in amount as to be unreasonable and monstrous. That is a reflection not upon the soundness of his decision, but upon the neglect of the insurers

(Lloyd's and the companies), to reform the memorandum so as to keep it in rational relation with the progress of British shipping. The S.S. Oregon, when she lately went down, is reported to have been worth more than 200,000l.; but taking the value at that figure, 3 per cent. on it is

Not, of
general and
particular
average.

(2.) A second rule is, that general and particular average cannot be added together for the purpose of making the underwriter liable for the aggregate amount obtained by this means in excess of the fixed percentage.¹

Not, of par-
ticular charges.

(3.) A third rule is, that expenses (technically denominated by average adjusters *particular charges*), incurred for saving or preserving the cargo or freight, such as warehouse rent in a port of distress, or the expense of reloading, cannot be added to the damage, in order to make it up to the required amount;² for, as Mr. Stevens says, these expenses are not of the nature of loss, *i.e.*, damage, but are charges incurred to preserve and bring forward the property; the clause only contemplates damage, and such damage as should arise from an accident.³ If, however, the damage independently of these charges, exceeds the excepted percentage, it is recoverable from the underwriter; and these charges themselves are in any event payable by the underwriter, irrespective of limit.⁴

Nor, of the
expenses of
ascertaining
the amount of
loss.

(4.) Fourthly, it is a rule, that the expense of ascertaining the amount of the damage cannot be added to the damage to make up the required percentage.⁵ But if the damage *per se* exceeds the required amount, then these charges are added to it and paid by the underwriter; otherwise they are paid by the assured; the rule being that they should fall on the party who must have sustained the loss had its amount been ascertained without any expense.

6,000*l.*, and if the average should be sixpence under, the insurer claims to be exempt from liability. Lord Esher severely animadverted in the course of his judgment on what he called the indolent negligence of the parties in entering into such a contract. In order to the first step in this much-needed reform, I offer the following suggestion for the amendment of the 3 per cent. clause as being restricted to the ship only. Let others improve on this, and then let adoption follow forthwith.

"The ship is warranted free from average under 3*l.* per cent. on 0,000*l.* and under; under 1*l.* per cent. on 0,000*l.* and under 00,000*l.*; and under ½*l.* per cent. on 00,000*l.* and upwards; unless it be general average."

¹ Stevens on Average, 232; Benecke, *Pr. of Indem.* 472; 2 Phillips, *Ins.*, no. 1779.

² Stevens, 230; Benecke, 472.

³ Stevens, 230. *Ante*, p. 797.

⁴ Benecke, 472.

⁵ Benecke, *Prin. of Indem.* 474;

2 Phillips on *Ins.*, no. 1791.

The second question is,—Upon what amount is the percentage to be calculated? (1.) It is a rule that the exception is limited in its application to the amount at risk under the policy at the time of loss, *i.e.*, if it amounts to 5 per cent. or 3 per cent. on the interest then on board it is sufficient, though it may not amount to 5 or 3 per cent. on the interest subsequently at risk under the policy. This is established by a very revolting instance. In a policy on a slave ship the slaves were warranted “free of average under 5 per cent. for loss from insurrection.” An insurrection took place at a time when there were only forty-nine slaves on board; seven were killed in suppressing it; and it was held that the underwriters were liable, this being a loss exceeding 5 per cent. of the number on board when it took place, though it was by no means 5 per cent. of the number that ultimately formed the complete cargo.¹

2. On what the percentage is to be calculated.

On the amount at risk at the time of loss.

(2.) Upon the articles enumerated in the 5 per cent. clause when insured in gross (as is often the case with hides, flax, hemp, &c.), the proportion of damage is calculated upon the whole amount of each specified article taken separately, *i.e.*, the construction of the memorandum is the same as if it were “sugar free of average under 5 per cent., tobacco free of average under 5 per cent., hemp free of average under 5 per cent.,” and so on with the rest of the enumerated articles. Thus, if flax and hemp be insured together, valued at 1000%: let the aggregate amount of damage upon both articles be 100%, *i.e.*, 10 per cent. on their whole value taken jointly; yet, unless the damage on each amounts to 5 per cent. of its value taken separately, the claim can be made good only on the one on which the damage reaches or exceeds that amount.²

When insured in gross the percentage is on the whole of each enumerated article.

(3.) Where, however, as in the 3 per cent. clause, the rest of the cargo under the general term “all other goods,” is

When not enumerated, then on all together.

¹ Rohl v. Parr, 1 Esp. 445.

² Stevens on Average, 223; 2 Phillips, Ins., no. 1785.

warranted free of average without any specific enumeration of distinct classes, it is obvious that the same rule cannot apply. Accordingly, the practice is to regard the whole of the non-enumerated articles as forming together one mass of property, and then to calculate the percentage of damage on the aggregate value of it.¹

Except where separately valued.

But if the non-enumerated articles have been separately valued in the policy, the usual practice is not followed; for it is said that this gives a distinct basis on which to compute the damage. Hence, if there be coffee valued at 300%, and tea at 3000%, the amount of damage on the coffee must amount to 9%, and on the tea to 90%, in order to make the underwriter liable; whereas, if it were 11% on the coffee, and 89% on the tea, he would be liable on the former only, and not on the latter.²

Where merely shipped in separate packages, still on the whole.

(4.) Where large quantities of the same description of articles, whether enumerated or unenumerated, are made up in separate packages, the damage must amount to 5 per cent. or 3 per cent. of the whole aggregate of packages of the same class of goods, and cannot be calculated upon each separate package.

Thus, suppose 101 hogsheads of sugar, or 101 bags of coffee, to be insured free of average, the former under 5 per cent., the latter under 3 per cent.: suppose, further, five of the hogsheads, or three of the bags, to be so damaged as to be wholly unfit for use, the underwriter is not liable.³

Otherwise according to special stipulations.

(5.) It is obvious that this mode of estimation must in many cases be unfavourable to the assured; in order, therefore, to protect himself and render the underwriter liable, where otherwise, on the strict construction of the memorandum, he could not be so, certain stipulations are introduced into the policy on behalf of the assured, as *e.g.*, in case of a steamer, "hull valued at £—, machinery at

¹ 2 Phillips, Ins., no. 1786.

2 Parsons, Ins. 41.

² 2 Phillips, Ins., no. 1788, and the case of Ocean Ins. Co. v. Car-
rington, 3 Conn. Rep. 357, there cited;

³ 1 Magens, 73; Stevens, 224; Benecke, 474.

£——, to pay average on each as if separately insured;” or in case of goods, “to pay average on each species, as though separate interests separately insured;”—“To pay average on ten, fifteen or twenty hogsheads, succeeding numbers, as if, &c.,” as before. If there are no numbers, in such case the practice is to disregard the clause entirely, and to pay the average only if it amount to the stipulated percentage on the whole quantity.¹ To meet the case where manufactured goods are shipped in bales or packages, the general clause inserted is “To pay average on each package, as if separate interests separately insured.”²

The effect of these clauses is to make the underwriter liable in many cases where he would have escaped from liability altogether upon the strict construction of the usual printed clauses. Thus, let 1000*l.* be insured on ten cases of manufactured goods valued at 100*l.* each case, “to pay average on each package, as if separate interests separately insured.” suppose five of the cases to be damaged each 3 per cent., or 15*l.* in the whole: then compensation may be claimed from the underwriters, though, without the clause, the loss must have amounted to 30*l.* in order to make them liable.³

If the damage exceeds the required percentage on the whole amount, the assured may, at his option, calculate the percentage either on the whole amount or on the damaged packages. Thus, supposing, on the same data, one of the cases to have been damaged 50 per cent., or 50*l.*, and the rest to arrive damaged only 1 per cent., the assured may recover the amount of damage on the nine cases, though under the required percentage, because the whole damage exceeds 3 per cent. on the whole value. The reason is, that this clause, having been introduced for the benefit of the assured, must be construed in his favour.⁴

Effect of these clauses.

Where damage exceeds the required percentage on the whole amount.

¹ Benecke, *Pr. of Indem.* 478, and see note, *ibid.*; and see as to ship and machinery, *Oppenheim v. Fry*, 3 B. & S. 873; 5 *id.* 348; 33 L. J. (Q. B.) 267.

² Stevens, 220.

³ *Id.* 226.

⁴ *Hagedorn v. Whitmore*, 1 Stark. 157; Stevens on Average, 226; Benecke, *Pr. of Indem.* 476.

Mr. Stevens says, that the insertion of these clauses is so much a matter of general usage whenever goods are insured direct from their place of growth or manufacture, that, even when omitted, the policy is acted upon as though they had been introduced.¹

It is held in the United States that, in order to calculate whether the percentage of loss amounts to 5 or 3 per cent. on the insurable value of the goods, the premium is to be deducted from that value.² But no such principle appears to be acted upon in this country; on the contrary, the rule here is that the underwriter is liable whenever the loss (under the limitations already pointed out), amounts to 5 per cent. or 3 per cent. respectively on the value in the policy, or on the prime cost and shipping charges *plus* the premium and other costs of insurance.

It is supposed by Mr. Stevens to have been the intention of those by whom the memorandum was first introduced, that the surplus only of loss above the 5% or 3% per cent. should be paid by the underwriter; the practice, however, in this country, more in accordance with what was reasonable, has uniformly been that, when the loss exceeds the excepted amount of percentage the underwriter is liable for the full amount of the loss, and not only for the surplus.³

Other express
warranties of
an exceptive
character.

During the war with Napoleon I., when almost all the ports of the Baltic were in a state of occasional hostility to this country, and ventures to those seas were undertaken without any fixed destination (the election of the ports of discharge being necessarily left to the captain's discretion, according to the exigencies of the case), frequently the underwriters inserted a stipulation that they should not be answerable for

¹ Stevens on Average, 225.

² Brooks v. Oriental Ins. Co., 7 Pickering's Rep. 509. See 2 Phillips, no. 1790.

³ Stevens on Average, 227, 5th ed.

The practice is the same in the United States; 2 Phillips, Ins., no. 1791.

the risk of capture, seizure, or confiscation in the ship's port of discharge.

Various cases were decided on the construction of these clauses, in most of which the sole question was, whether the ship, at the time of seizure, was in that which, with reference to the nature of the risk and the whole of the circumstances of the case, could fairly be regarded as her port of discharge within the contemplation of the parties to the policy. The Courts, as the nature of the subject required, exercised great liberality of construction in forming a judgment on this point, guiding themselves rather by the nature of the risk and the intention of the parties, than by the strict and legal meaning of the term port.

To be free from seizure in port of discharge.

Hence, it was decided by Lord Ellenborough, that if a ship, "warranted free from capture and seizure in her port of discharge," once come within the danger of capture from the land, for the purpose and with the intention of discharging her cargo, she should be considered to be in her elected port of discharge within the meaning of this warranty; and this, whether she come to an anchor in an open roadstead, outside a harbour, the same being a place where ships of burden usually unload,¹—or lie on and off in a river forming the estuary of a port, waiting for intelligence;² provided, in each case, this be done for the purpose and with a design of discharging there, of which purpose and design the jury are the best, and, indeed, only proper judges.³

What is a port of discharge.

If, on the other hand, the ship be at anchor, not only outside the harbour, but in the open sea, outside the roadstead in which ships usually discharge their cargoes, though

¹ *Dalglish v. Brooke*, 15 East, 295, the leading case on the subject of this warranty. *Oom v. Taylor*, 3 Camp. 204; *Maydew v. Scott*, id. 205, overruling *Keyser v. Scott*, 4

Taunt. 660.

² *Jarman v. Coape*, 13 East, 394; *S. C.*, 2 Camp. 613.

³ *Reyner v. Pearson*, 4 Taunt. 662; *Levin v. Newnham*, *ibid.* 722.

she be there captured by a force from the shore, this is not a loss from which the underwriters are protected by the warranty.¹

To be free
from confisca-
tion in port of
discharge.

Confiscation means more than capture, and imports "an act done in some way on the part of the government of the country where it takes place, and in some way beneficial to that government, though the proceeds need not, strictly speaking, be brought into its treasury."² Hence, where a ship, "warranted free from confiscation by the government in the ship's port or ports of discharge," was boarded in Pillau roads (a Prussian port) by two parties, one of Prussian soldiers, the other, part of the crew of a French privateer, and was condemned by the Prize Court at Paris as prize to the French captors; this was held not to be a confiscation by the Prussian government, and therefore not a risk excepted by this warranty.³

To be free
from capture
and seizure in
port.

The Courts put a different construction on the warranty to be free from capture in the ship's "port of discharge," and on the warranty to be free from capture "in port or ports" generally.⁴

In the first case, as we have seen, they considered the intended place of unloading "the port of discharge," though an open roadstead and not *infra præsidia portus*: in fact, as Bayley, J., expressed it, in *Jarman v. Coape*, the word *port* in such warranties was regarded as used in contradistinction to the *high seas*.⁵

On the other hand, they determined that a warranty against capture in port generally could not be available for the underwriters, unless the ship, at the time of capture, was actually within some port; and that it was not sufficient, under such a warranty, that she should then be in an

¹ *Mellish v. Staniforth*, 3 Taunt. 499; *Levy v. Vaughan*, 4 Taunt. 387; *Keyser v. Scott*, *ibid.* 660; *Levin v. Newnham*, *ibid.* 722.

² Per Lord Ellenborough, in 16 East, 269.

³ *Levi v. Allnutt*, 15 East, 267.

⁴ Per Lord Ellenborough, in *Jarman v. Coape*, 2 Camp. 614.

⁵ Per Bayley, J., in *Jarman v. Coape*, 13 East, 398.

open roadstead, where ships, in ordinary circumstances, sometimes lighten, but never discharge their cargoes;¹ nor within the headlands which form the mouth of a river. Hence, where a ship, insured from Rotterdam to London, and "warranted free from capture in port," was captured while lying at anchor off Ghoree, in the river Maes, within the headlands which form the mouth of that river, the underwriters were held liable.²

Capture as known to marine insurance law is a taking by armed force from without, with intent to deprive the owner of the possession and property of the thing captured. Whether such taking be by the military or the navy of a hostile state or people, or by pirates or rovers on the high seas (*hostes humani generis*), it is equally a taking within the effect and sense of the term capture. To be free from capture and seizure.

Seizure is a taking, but with the absence of all those facts or circumstances that give to successful capture the immediate effect in marine insurance law of a total loss. Seizure, however, may result in a total loss, or in something less. Seizure may be from without by lawful armed force, as by the coast-guard of a state in a time of peace for offences against its municipal law, *e. g.*, smuggling; or by a people in a state of revolt or anarchy; or by savages with intent to plunder the cargo, and loss, total or partial, results to the ship as the immediate effect or direct consequence; or it may be from within the ship, as if the crew or part of it, or the passengers, or part of crew and passengers, rise in mutiny, and taking command of the ship carry her off with intent to deprive her owners of it.

¹ *Brown v. Tierney*, 1 Taunt. 517.

² *Baring v. Vaux*, 2 Camp. 541. It has been said that in declaring for a loss by capture, on a policy that contains a warranty against capture in ship's port of discharge, it is not

necessary to negative that it was in port *sed quere*; no doubt such declaration might be held good after verdict; *Rucker v. Green*, 15 East, 288.

If a ship warranted free from capture and seizure be lost under such circumstances, that the proximate cause of loss is perils of the sea, notwithstanding interference by the enemy, the underwriter will not be protected by the warranty;¹ on the other hand, although she may have been severely damaged by sea perils, and thereby exposed to seizure, yet, if the capture and condemnation are the proximate cause of loss, the underwriter will be discharged.²

Under a warranty to be "free from capture or seizure," it matters not whether the act done be lawful or unlawful, whether by pirates, mutinous passengers, or persons armed with state authority, the underwriter is not liable.³

To be free from capture and seizure and the consequences thereof.

Where a ship, warranted "free from capture and seizure, and the consequences thereof in her port of loading," in order to avoid such seizure, ran to sea before she was properly loaded, and was, in consequence, obliged to put into a port out of the course of the voyage insured, and she was wrecked there, it was held that the underwriters, under this policy, were not liable.⁴ She escaped from port to avoid a loss which the insurers were not liable to bear, and when she was lost she was out of her due course, carried thither seemingly because she left port in a state of unseaworthiness. For the freight of the same ship, insured by a policy which did not contain this warranty, it was held that they were liable for the loss.⁵ The freight was lost by one of the perils insured against, in the attempt to save it from another of the perils in the policy.

¹ Hahn v. Corbett, 2 Bing. 205; 9 Moore, 390; Ionides v. The Universal Marine Insur. Assoc., 14 C. B. N. S. 259; 32 L. J. (C. P.) 170.

² Livie v. Jansen, 12 East, 648; Green v. Elmalie, Peake, 212. See Ionides v. The Universal Mar. Insur. Assoc. *supra*.

³ Powell v. Hyde, 5 E. & B. 607;

Kleinwort v. Shepard, 1 E. & E. 447; 28 L. J. (Q. B.) 147; Cory v. Burr, 8 App. Ca. 393; 9 Q. B. D. 463; Johnston v. Hogg, 10 Q. B. D. 432.

⁴ O'Reilly v. Royal Exch. Ass. Co., 4 Camp. 246.

⁵ O'Reilly v. Gonne, 4 Camp. 249.

Consequences, within the law of marine insurance, has been determined to mean a constant effect of the same cause. A policy was effected, after the American civil war had begun, on 6500 bags of coffee, English property, with English insurers, by a Federal ship from Rio Janeiro to New York, "warranted free from particular average unless the ship should be stranded, sunk or burnt; warranted also free from capture, seizure and detention, and all the consequences thereof, or of any attempt thereat, and free from all consequences of hostilities, riots or commotions." An important light, for years established on Cape Hatteras, was extinguished by the Confederates with hostile intentions against Federal shipping. The ship in question between New Orleans and this Cape had lost her reckoning, looked in vain to descry the light, although, had it been burning, it was admitted she could have seen it and recovered her course, avoiding the danger. As it was, she went ashore in a heavy sea a few miles south-west of the lighthouse, and the greater part of the cargo was lost. It was held that the *consequences* intended in the warranty were such only as constantly follow the operation of the same cause; and as loss could not be predicated as the constant effect of the light being out in respect of every ship bound on the voyage insured, the case was held not to be within the warranty, and the plaintiff recovered as for a loss by perils of the sea.¹

*Consequences,
in Insurance
Law.*

It is customary at Lloyd's to insure live stock with a "warranty to be free from mortality and jettison;" and, in practice, underwriters so insuring are not considered liable for any loss arising from death of cattle, where the ship arrives safe, but only where the ship is lost and the animals are drowned. This usage, though undoubtedly established at Lloyd's, has been determined to be only legally binding

*To be free
from mor-
tality and
jettison.*

¹ *Ionides v. The Universal Marine Insurance Assoc.*, 14 C. B. N. S. 259; 32 L. J. (C. P.) 170.

on those who can be shown to be cognizant of it.¹ In order to avoid all possibility of misconception, it would seem advisable for underwriters on live stock desiring thus to limit their liability, to make the warranty "free from all loss of any kind on the animals insured if the ship arrives safe."

We have already seen what losses will and what will not be considered as falling within the exception of losses by mortality.²

¹ *Gabay v. Lloyd*, 3 B. & Cr. 793; son, 6 T. Rep. 656; *Lawrence v. Dowl. & Ryl.* 641. *Aberdeen*, 5 B. & Ald. 107; *Gabay v.*

² *Ante*, p. 724. *Tatham v. Hodg-* *Lloyd*, 3 B. & Cr. 793.

CHAPTER IV.

GENERAL AVERAGE.

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THE law relating to General Average regards ship and cargo together as one combined adventure, comprising a variety of interests all exposed to the perils of the sea, and equally concerned under a common danger in the averting of a total loss; and it prescribes, in case of sacrifice of part for the preservation of what remains of the common adventure, that the loss accruing by reason of the sacrifice shall be assessed upon the value of what remains, together with the value of the thing sacrificed, in order to recoup the loser, and place him once more on a footing with his co-adventurers.

What is
General
Average.

General Average is an indefinite phrase,¹ used in practical life, to denote three things which are very distinguishable each from the other, namely, the act of making the sacrifice, the loss sustained as the direct consequence of that act, and

¹ See this phrase considered as to its origin, meaning, and history in the maritime law, in a note by the Editor appended to the end of this chapter.

In rewriting, recasting, and revising the present chapter the Editor has had the invaluable advantage of

suggestions and information kindly placed at his service, in reference to questions of practice, by gentlemen, of London and of Liverpool, in the first rank of their profession as average adjusters, to whom he owes this acknowledgment of obligation.

the contribution levied on the adventure to recoup the loser. These distinctions enter into the essence of the legal questions arising out of such an event; otherwise, they might perhaps be neglected in this treatise, at the risk of some confusion, indeed, but with the advantage of not seeming to quibble upon verbal refinements. They are, therefore, denoted in the following pages by a distinction of phraseology, the first as a General Average Act; the second, as a General Average Loss; and the third, as a General Average Contribution. We shall, with these distinctions in view, consider what circumstances justify a General Average Act, and determine the resulting loss to be a General Average Loss, and what property or who in relation thereto is liable, and on what principles, to contribute towards recouping the loser.

The singular law relating to this subject, adopted and observed by all the maritime peoples of Europe, and now also of America, is derived to us from the Rhodians through the ancient Romans, who have devoted an entire title in the Fourteenth book of the Digest to the consideration of the *Lex Rhodia de jactu*, and the development and application of the principle involved in the solitary fragment which has been preserved of that law. *Lege Rhodiâ cavetur, ut, si levandæ navis gratiâ jactus mercium factus sit, omnium contributione sarcitur, quod pro omnibus datum est.*

Introduced and justified by expediency, and sanctioned by the principles of natural equity, this law appears from various circumstances to be regarded by the laws of England as founded upon an implied contract between the co-adventurers entered into on the eve of the expedition. It is unknown to us except in connection with seafaring adventure, resembling in that respect the law of salvage. A claim for salvage, however, is not enforceable at common law, because the demand is based not upon contract, but upon voluntary service. A claim for general average, never dealt with by the English Admiralty since its jurisdiction was trammelled in the reign of Charles II., is maintainable in the common law courts, where it is regarded as resting on

contract. Salvage is protected by a maritime lien, independent of possession, and enforceable by suit in the Court of Admiralty; general average is protected by a common law lien only, which is dependent on possession, and enforceable in no other way than by continuous retention.

Such, then, being the basis on which it is placed by the laws of England, contract must by us be regarded as its principle, whilst we see that it is justified by expediency, and are sensible that it is commended by its equity. *Æquisimum enim est commune detrimentum fieri eorum, qui propter amissas res aliorum, consecuti sunt ut merces suas salvas habuerint.*¹

We come now to consider the law with regard to a General Average Act. Since a General Average Act is the intentional sacrifice of money or part of the common adventure on account of the common adventure, the question comes to be, what are those circumstances that justify the sacrifice? Danger, of course, is an indispensable element; but that is a word of so indefinite a meaning as by itself to be incapable of yielding a rule with defined limits. Danger of so overwhelming a character as clearly to defy human efforts to avert it, renders any sacrifice whatever for that purpose wilful and useless. But when the danger is of a total loss of the common adventure, so imminent and conclusive as in the view of a judicious and skilled mariner to admit of but one alternative, and that the alternative of a sacrifice, say of part of the whole, the making of such sacrifice is justified in fact, becomes a duty of the master as agent of all, and is a General Average Act in law.

What is a
General
Average Act.

If this be a correct description of what constitutes in law a General Average Act, then it appears to consist of (1) an intentional act on the part of man, (2) out of the course of

Conditions of
a General
Average Act.

¹ Dig. xiv. 2, 2.

the master's ordinary duty as agent of the shipowner, (3) done on account of the common adventure, (4) to avert a total loss of the whole, (5) under circumstances in which it is the only alternative.

1. The sacrifice must be intentional.

First, it must be an intentional act on the part of man, a deliberate sacrifice to appease the exigency of the crisis, as distinguished from the chance result of the operation, say, of the natural elements. If a storm arises, and the sea is making a clean breach over the ship, or the ship is thrown on her beam ends, and the master to avert total loss casts part of the cargo overboard, or cuts away the masts, he does what in the circumstances is a General Average Act, the deliberate effort of his will making choice of the only alternative of which his position admits. If instead of this use of means to an end, the storm were to operate the effect proposed, say, by washing out the goods, or snapping across the masts, the loss resulting, although attended with benefit to the residue of the adventure, would fall upon the respective owners of the property carried away, and be a particular average loss.

Is human will proximate cause of the loss?

But how then, if human will be the immediate agent, is the resulting loss, which forms the exact measure of the sacrifice, recoverable from the insurer, who contracts only to indemnify against the immediate effect of certain specified perils? For no man can take advantage of his own wrong, or of the wrong of his agent. It has even been doubted by high authority whether a general average loss be recoverable from the insurer in virtue of his contract, or in virtue of a usage pre-existing the contract and now necessarily understood as a term between the parties.¹ This, however, seems to be common to both views, that his liability is something special, and extrinsic to a contract of indemnity against the perils mentioned in the policy.

¹ See the judgment of the C. P. the observations of Martin, B., in *Kidston v. The Empire Marine Ins. Co.*, L. R. 1 C. P. 535; and *Miller v. Titherington*, 30 L. J. (Ex.) 317.

With deference I doubt whether the supposition involved in either of these views be required to meet the circumstances of the case. To test this, let it be supposed that we are considering a case of jettison. Then, *ex hypothesi*, one of the perils insured against is so exigent that there is a certainty of total loss of the adventure with a probability of saving most of it by a sacrifice of part. There is thus a choice of losses, a greater and a less : and a supervening will to avert the greater by submitting to the less. There is a selection of part from the whole ; there is an anticipation in time of the moment of the impending calamity ; and by a surrender of part there is a saving of the residue. The master, however, cannot help but there shall be a loss. It is for this reason that in view of the law the act of jettison under such circumstances is not tortious. It is done in obedience to the tempest. It is, therefore, a loss due to a peril of the sea, and therefore by the contract a loss that falls upon the insurer.

Mr. Benecke, strange to say, is of opinion that "if the master's situation was such that but for a voluntary destruction of a part of the vessel, or her furniture, the whole would certainly and unavoidably have been lost, he could not claim restitution, because a thing cannot be said to have been sacrificed, which had already ceased to have any value."¹ Upon this, be it observed, that in the midst of the most critical circumstances it is assumed there still was the alternative of safety for the residue by sacrifice of part ; therefore it is not true that the adventure could have ever ceased to be of value. Moreover, the part to be sacrificed, while possessing its proportionate value, became also, in effect, in the metaphorical language of Mr. Benecke, the price of the rest, and might, with as much propriety and truth, be said to have thereby acquired a greatly enhanced value. But in truth, when the question of value for the purposes of general average comes to be considered, the adventure is already in port, and that question is there

Opinion of
Mr. Benecke.

¹ Benecke, 283.

determined, not by a metaphor, or upon an application of the doctrine of chances to the circumstances existing at the time of the jettison, but by the measure which the market would apply to the adventure in safety. The proposition of Mr. Benecke involves a contradiction, rests upon what seems to be a metaphor, and as applied to general average is a mere fallacy. Mr. Phillips might well say that the correctness of it admits of great doubt.¹

Application of
this opinion.

It is said, however, that the supposed principle involved in Mr. Benecke's proposition is applied in practice to certain cases that may not unfrequently occur. For example, part of the cargo in the hold is on fire, and the fire is extinguished either by pouring water down the hatchway, or by scuttling the ship [if she be in shallow water], so that other parts of the cargo not on fire are injured by this application of the water. This injury by water is usually adjusted, not as general, but as particular average.

Now, as to this, it is conceded that fire is a peril insured against; and that ship and cargo are in the embrace of total destruction, with the alternative, in view, of partial safety by drowning. The injury by drowning is preferred for the sake of the benefit to be procured by it for the adventure. According to this description then, the act supposed seems to satisfy the conditions of a general average act. The result, indeed, may be, that there is nothing to adjust. For instance, if the whole adventure, being put under water, could be supposed to be equally injured, the benefits would be equal also. It is only on the supposition that the resulting injuries are unequal, as probably in every instance they will be, that a general average is necessary to place the different parties to the adventure on a footing of proportionate loss and benefit.²

¹ 2 Phillips, Ins., no. 1271.

² Soon after these paragraphs appeared in print, the very case supposed occurred in 1872; a vessel whilst loaded was scuttled to extinguish a fire on board, and the damage

resulting was adjusted as general average; at the trial, at Guildhall, of an action to recover it, Cookburn, C. J., told the jury that in law it was general average, and asked them whether there was any valid custom

Another instance is sometimes cited of the application of Benecke's alleged principle from the case of what is called voluntary stranding. But it is not proposed to discuss that case here, if indeed anywhere it admits of beneficial discussion apart from the ascertained facts of an actual case. All that was intended in this place was to advert to an alleged principle, and to consider whether it ought to be received in practice.

Secondly, an act which would fall within the compass of the ordinary duties of the shipowner, cannot be regarded as a general average act. The danger may be pressing, and the efforts to escape it may be attended with loss, but if the means employed are such as come within the shipowner's

2. The sacrifice is out of the ordinary course of duty of the Master or his owner.

against such a loss being so adjusted. The jury returned that there was no such custom; *Achard v. Ring*, 31 L. T. N. S. 647. Subsequently to this, a similar fire on board similarly extinguished, was the occasion of the question being brought before the Court of Q. B. An owner of cargo which had been injured by the sea water let in to extinguish the fire, held a bill of lading with these words in it: "Average, if any, to be adjusted according to British custom." The loss was determined by the Court to be general average, but as it appeared to be the practice of average adjusters in this country not to adjust such a loss as general average, the plaintiff, being bound by the terms of the bill of lading, could not recover. But the Court took occasion to animadvert on the impropriety of such a practice being followed at variance with the law of the country; *Stewart v. West Ind. & Pacific Steamship Company*, 42 L. J. (Q. B.) 84. On appeal, the Ex. Ch. pronounced no opinion as to whether the loss was general average, but otherwise affirmed the judgment below, L. R. 8 Q. B. 362. The point was again

raised, but ineffectually, before the Q. B. Div. in *Aspinwall v. Merchant Shipping Co.*, Easter S. 1876. Blackburn, J., presiding, took occasion, however, to express his concurrence in the judgment given by the Court of Q. B. in *Stewart v. West Ind. & Pacific S. S. Co.* as to the loss being a general average loss.

In 1882, the question was again raised against the shipowner whose servants had damaged the goods of the plaintiff by pouring water into the hold of the ship to extinguish fire in other cargo on board, which might have destroyed both cargo and ship, and it was held by the Court of Appeal to be a general average loss, for which the defendant must contribute his share; *Whitecross Wire, &c. Co. v. Savill*, 8 Q. B. D. 653.

It since appearing, upon evidence, that average adjusters endeavour to follow the law, their practice was held not to amount to a custom of trade; *Svensden v. Wallace*, 46 L. T. N. S. 742. Hence the point in *Stewart v. West Ind. & Pacific S. S. Co.*, as to *British custom*, ceases to be material.

contract to carry, the loss falls only upon himself. His ship, in time of war, is armed for the purpose of offering resistance in case of necessity. An enemy overtakes her at sea. She engages and drives off the enemy, but suffers heavy damage to her hull, rigging, and crew. It was her duty to engage the enemy, and she must brave her misfortunes without recourse against her co-adventurers. The same law would hold if she were, under the circumstances supposed, to escape by a press of sail, and to sustain injury from straining, or the loss of a mast, in consequence. It was the duty of the master in virtue of his charter party, and the policy of this nation in time of war, that he should make every effort to escape, whether by crowding sail, or by working his guns.¹

The same law holds in the case of a ship so injured in the course of the voyage by sea perils as to be unable to carry sail, which is therefore brought home under her auxiliary screw at an increased expense of 1400%. The Court said in that case, "the disbursement for coals was extraordinarily heavy, but that did not render it an extraordinary disbursement. The case is similar to that of an ordinary sailing vessel, in which, owing to disasters, the voyage is unusually protracted, and consequently the owner's disbursements for provisions and for the wages of his crew, if they are paid by the month, are extraordinarily heavy. It is not similar to that of the master hiring extra hands to pump when his crew are unable to keep his vessel afloat, or any other expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature."²

On the other hand, where a vessel, with a cargo on board, encountered heavy weather which continued for many days

¹ *Covington v. Roberts*, 2 B. & P. N. R. 378; *Taylor v. Curtis*, 6 Taunt. 608; 2 Marsh. R. 309; 4 Camp. 334; *Wilson v. Bank of Victoria*, L. R. 2 Q. B. 203.

² *Wilson v. Bank of Victoria*, L. R. 2 Q. B. 203, 212, 213. *Accord.* *Harrison v. Bank of Australasia*, L. R. 7 Ex. 39.

and strained her so much that she sprung a leak and wearied out her crew to keep the water from gaining in the hold, the master connected the pumps with the donkey engine, and after the supply of coals, which would have been sufficient for the donkey engine during the voyage under ordinary circumstances, had been exhausted, he used the ship's spare spars and part of the cargo as fuel, to keep the donkey engine going, and so saved the ship and the remainder of the cargo; it was held that the spars and cargo so consumed were a general average charge upon the adventure.¹

The following is often cited as an instance of extraordinary sacrifice:—The captain of a French ship, after being chased all day by an enemy who was rapidly gaining on him, at nightfall deliberately launched his long boat, fitted her with a mast and sail, fixed a lantern in her mast head and set her adrift; at the same time he hauled down the ship's lights and altered her course. The long boat, followed by the enemy, drifted away before the wind, and was lost; but the ship, by means of this manœuvre escaped. The loss of the boat under these circumstances was held to be a general average loss, as it was an extraordinary sacrifice, intentionally made for the sake of saving the ship and cargo.²

Thirdly, in order to its being a general average act, it must have been a sacrifice made for the common adventure. This is the inference involved in the acknowledged right of the loser to be recouped by and in proportion to the whole adventure. Therefore, if there be no common danger existing, or if no common benefit be contemplated, the act which entails the loss cannot give a right to contribution in common. A vessel laden with grain being off the coast of Ireland was taken possession of by a tumultuous mob for the sake of the grain, and the master was obliged by them to sell his corn at a very low price.³ The exigent danger

3. The sacrifice must be for the common adventure.

¹ *Robinson v. Price*, 2 Q. B. Div. 91; *Harrison v. Bank of Australasia*, L. R. 7 Ex. 39.

² *Emerig. c. xii.*, s. 41, p. 606.

³ *Nesbitt v. Lushington*, 4 T. R. 783.

affected only the cargo, and the cargo had to bear the loss. In another case the master, when his ship was on the point of being captured, threw overboard a quantity of dollars, merely to prevent their falling into the hands of the enemy.¹ The danger was common, but only the dollars were considered in the jettison, which moreover was not such as could have modified the danger, and the consequence was a particular average loss.

It is the daily practice, however, of average adjusters, with the sanction of the Courts, to adjust a sacrifice of property made to avert a total loss from a single interest, when that constitutes the whole adventure, as if it were general average. A ship in ballast, for instance, is driving upon a lee shore, dragging her anchor, and the master has only time left to cut his cable and put out to sea in order to escape a total loss. The anchor and cable are dealt with as in the nature of general average.² It is, in fact, an expenditure in another form.

Expenditure for a single interest to avert a total loss is regarded by the Courts as falling within the terms of a special clause in the policy, namely, the sue and labour clause.³

Success not a condition.

The occasion of the act, and the intention with which it is done, being such as we have mentioned, it is not necessary that success should appear or be proved to have followed it as effect on cause, in order to its being allowed as a general average act. There was a different opinion prevalent at one time on this point.⁴ The practice, however, is now entirely the other way, and seems in this respect to be justified by what is probably the better opinion. For who could determine that safety when it does follow was procured by the means which were used? Or, who could tell what instantaneous change in the conditions of the problem

¹ *Butler v. Wildman*, 3 B. & Ald. 398.

² See per Curiam, *Oppenheim v. Fry*, 3 B. & S. 873; 5 id. 348.

³ See per Curiam, *Kidston v. Empire Marine Ins. Co.*, L. R. 1 C. P. 535; ante, p. 796.

⁴ This was Mr. Arnould's opinion.

at the moment of jettison, may have baffled the soundest judgment formed the moment before? And if the master be justified, that is, be not liable to an action for wrong, in throwing the goods of A. overboard, is A., notwithstanding he was required for the general good to submit to a jettison, to go unrecouped till he has proved to the satisfaction of others that the safety of the adventure was not independent of his loss? In a word, there is an impracticability in the way of making success a condition, that seems a sufficient reason in law why it should not be exacted.

Fourthly, the danger which we have mentioned oftener than once within the last few pages, is the imminency of a total loss of the whole adventure. It is not conceivable that anything short of this could authorize the master in the view of any law to deal with ship and cargo, the whole of the property under his charge, with the absolute power which he wields in such a case as jettison. He may, under proper circumstances, in the exercise of a sound judgment, cast away any portion of it he pleases. The owner of the portion may not say unto him, What doest thou? And the other owners embarked with him, are bound by the master's act, and obliged to buy their co-adventurer's loss as a gain to themselves.

4. It must be to avert a total loss of the whole.

If the master were to resort to this power to avert a mere average loss, who could say that the jettison was not a greater mischief than would have been wrought by the elements? Or, that the elements would have damaged more than a single interest, and in that case, whether A. has not suffered a loss at the hands of the master, which would have fallen at the will of the tempest upon B.? Or, if not on B., then upon C., D., or E., some, or one of them, but on which, it may be, none can say further than that A. would not have suffered; and who is to recoup A. could not be determined.

No, it is the conclusive totality of the threatened loss which places every part of the adventure at the sovereign

disposal of the master to act for the preservation of it, or part of it, with the judgment and decision, and at the same time with the concern, that might be expected of him were he sole proprietor of the whole.

5. It must be the only alternative of a total loss of the whole.

Fifthly, all this necessarily supposes, however, that the act of the master is done under circumstances in which such act is the only alternative. There must be an alternative to total loss, otherwise any effort to avert it, however instinctive, is wilful and worthless, and consequently quite unrecognisable by human law. Moreover, if there be another alternative besides the one selected by the master, total loss is not so proximate as to call into operation the law which places the whole expedition in his discretion and then clothes his exercise thereof with its authority. On the other hand, the proximity of total loss, when it admits of an alternative, so far from reducing the adventure to valuelessness, as Mr. Benecke supposes, exaggerates the apparent value of the whole in view of the crisis in which the master is compelled to act, and brings into such prominence the claims of each portion in competition with others for preservation, that judgment, decision, and promptitude become eminently requisite in dealing with the emergency.

Summary.

A general average act thus appears to consist of an intentional act on the part of the master, out of the course of his ordinary duty, done on account of the common adventure to avert a total loss of the whole, under circumstances in which it is the only alternative.

What losses are General Average Losses.

We proceed now to consider, with reference to the principles which distinguish a general average act, what losses in the course of the voyage ought to be allowed as general average. These conveniently arrange themselves under the two distinct heads of sacrifice and expenditure. This division, besides serving the purposes of order, coincides with the difference of principles on which sacrifice and expenditure

respectively are adjusted. What these principles are, we shall see in treating of adjustment. At present, we proceed to deal with cases in the nature of sacrifice of part of the expedition, and first, as concerns the cargo, with jettison of part of it.

A jettison of cargo that satisfies the conditions required of a general average act, becomes a loss to be distributed over the whole adventure as general average. A loss of this kind, as an illustration of the law which we are discussing, appears to be the only relic of Rhodian law on the subject that has come down to us. Such a loss seems likely to have been the earliest occasion of a claim in the nature of general average. The shipowner being under contract with the owners of cargo to carry them safely to their destination would not so readily see when an injury to his ship was beyond the obligations of his contract. But a jettison of cargo for the benefit of all the interests afloat, in the absence of liability or obligation to any of them, would naturally suggest the existence of a principle of law; and when by-and-by this principle was discovered to be of general application, it might notwithstanding continue to be discussed still under a designation wholly appropriate to the particular event, with which it was first associated and had come already to be identified. Accordingly, all the learning on this subject of the Roman lawyers, after the accumulations of more than six centuries, was digested by Justinian under the title of *Lex Rhodia de jactu*. Jettison of cargo.

Cases plainly within the compass of the general principle need no illustration. There are cases, however, of a somewhat disputable character. For instance, deck lading.

Goods carried on deck are *prima facie* not in their proper place; besides, it is nearly always true of them that they impede the navigation of the ship. On both grounds, it is a received rule, that deck lading gives no occasion to general average.¹ Jettison of Deck Cargo.

¹ *Ross v. Thwaite*, 1 Park, Ins. 23; see *Da Costa v. Edmunds*, 4 Camp. Backhouse v. Ripley, *ibid.* 24; and 142; per Tindal, C. J., in *Gould v.*

But an exception to this general rule may be created by custom; as where it is the custom in a particular trade to carry part of the cargo, or articles of a certain character, on deck; for by the custom, the deck becomes a proper place for the goods, and those who embark in that trade, as merchants, shipowners, or insurers, accept the impediment of deck lading as another peril of the traffic, with the usual incident of general average in the case of deck cargo, attaching to the adventure.¹

To this exception there may be an exception by way of custom in such a trade, whilst submitting to the disadvantages of deck lading, not to pay or bear any part of the loss created by jettison of goods from the deck.²

Another exception may be created by express contract between the parties.³ The shipowner in the charter-party may stipulate to be at liberty to carry deck load. In the absence of more than this, it would seem as between the shipowner and the owner of the deck cargo, that the law of general average would attach, comprehending cargo below, in so far as that and the cargo above deck belonged to the same owner.

Accordingly, in *Johnson v. Chapman*,⁴ where the charterer filled the hold with timber and loaded deals on deck, Willes, J., held that the shipowner was liable for a general average contribution in case of jettison of the deck cargo. But beyond this, such a contract between the shipowner and the owner of the deck cargo could not operate so as to subject others to general average for deck lading, even if there were a stipulation in their charter-party or bills of lading for leave

Oliver, 2 Sc. N. R. 252; 1 Emerig. c. xii. s. 42, p. 623; Benecke, Pr. 293; Co. de Com. art. 421; Lowndes, Gen. Av. 39.

¹ *Da Costa v. Edmunds*, 4 Camp. 142; *Gould v. Oliver*, 4 Bing. N. C. 134; *S. C.* on claim by shippers against shipowners for the full value of the timber, 2 M. & Gr. 208; 2 Sc. N. R. 241; *Miller v. Titherington*,

30 L. J. (Ex.) 217; 6 H. & N. 278; 7 H. & N. 954; *Johnson v. Chapman*, 35 L. J. (C. P.) 23; 19 O. B. N. S. 563; *Milward v. Hibbert*, 3 Q. B. 120; *Harley v. Milward*, 1 Jones & Carey, Ir. Ex. 224; Lowndes, Gen. Av. 45.

² *Miller v. Titherington*, ubi supra.

³ Lowndes, Gen. Av. 47.

⁴ *Johnson v. Chapman*, ubi supra.

to the shipowners to carry goods on deck, provided they were not in any way concerned as owners with the property so carried.¹ Further, if a shipper contracts to have his goods carried on deck, and the contract is silent as to general average contribution or liability in case of jettison, the shipowner is not liable for a loss of deck cargo by justifiable jettison.²

In the case³ of a cargo of timber and iron from a Baltic port to London, with a deck load of timber which had been jettisoned, the shipowner was sued by the cargo owner for general average contribution, due in virtue of a custom in that trade to carry deck cargo. The defence was, that under a clause of the charter-party,—“the steamer shall be provided with a deck load, if required, at full freight, *but at merchant's risk*,”—the shipowner was not liable. The Court of Appeal, reversing the judgment below, held that this language did not apply to general average. There is but one difficulty in the way of arriving at that conclusion, and Lord Esher disposes of it in these terms:—“Lord Bramwell, in his judgment in *Wright v. Marwood*,⁴ considers the right to general average contribution to arise from an implied contract, but although I always have great doubt when I differ from Lord Bramwell, I do not think that it forms any part of the contract to carry, and that it does not arise from any contract, but from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved. If this be so, the liability to contribute does not arise out of any contract at all, and is not covered by the stipulation in the charter-party on which the defendant relies.”

Burton v. English.

¹ See the judgment in *Wright v. Marwood*, 7 Q. B. Div. 62; Gordon v. Id., *ibid*.

Wright v. Marwood, *ubi supra*.

³ *Burton v. English*, 12 Q. B. Div. 218.

⁴ 7 Q. B. Div. 67.

Lord Esher's
opinion not
law.

It is not now within the power of any existing English tribunal to give effect to general average according to the view of it expressed in these terms. That the liability to general average contribution rests in this country on contract, and that the law of England implies such a stipulation in every contract to carry by sea, admits of no doubt. The question does not rest on Lord Bramwell's authority. It was settled two hundred years ago by all the Common Law Courts of Westminster Hall combined in their fierce struggle with the Admiralty jurisdiction, when by repeated writs of prohibition they reduced that Court to within the narrowest limits, and assumed to themselves exclusive jurisdiction over some of the matters purely maritime in their origin, nature, and remedies. Changes for that purpose were unscrupulously made in such of them as could not otherwise be brought within the cognisance and accommodated to the principles and the practice of the common law. Salvage always defied any such transformation. To this day a salvor who sues at common law recovers nothing. Salvage remains within the exclusive cognisance of the Admiralty law.

Why not law.

But general average, although the merest creature of maritime custom, clothed at one time like salvage with a maritime lien, did admit, as a possibility of which it was capable, of the presupposition of a contract as its basis. The stipulation among all the parties to a maritime adventure before setting out to contribute to a general average loss was, I daresay, never heard by human ear or seen by human eye. Its implied existence, indispensable if it were to be dealt with at common law, was asserted as the basis of the writ of prohibition against the civilians in presuming to encroach on the jurisdiction of the King's Courts; the maritime lien by which it had been supported was stripped from it; and it was clothed with a common law lien, a thing unknown at sea, enforceable only by continuous possession. Thus assimilated, it became part of the common law of England, for that purpose necessarily resting upon contract, and that contract, lest English adventurers should find themselves at sea

without the powers, the remedies, and the protection which others derive from the customs of the sea, is, as a matter of law, implied in every English contract to carry by sea. General average in the view taken of it by the Court of Appeal is now, in consequence of this action of the Common Law Courts two centuries ago, without a Court to administer it in England, and without a lien that can be enforced.¹

The application of the law of general average to any adventure, or to any portion of the adventure resting wholly upon an implied contract, may always be set aside by the express contract of the parties at the time of the agreement to carry being made; and in the case before the Court the express language of the parties in their written contract to carry relating specifically to the deck cargo is, as Lord Esher well saw, incompatible with the general average contract which the law would otherwise have implied.

I think, therefore, that *Burton v. English*, and *Crooks v. Allan*,² cannot be sustained before any Court in England.³

Burton v. English,
Crooks v. Allan, not
law.

¹ From the time here intended, that is, the reign of Charles II., the Court of Admiralty ceased to have jurisdiction over questions of general average; *The Constanca*, 2 W. Rob. Ad.487; *The North Star*, Lush. Ad.45.

² 5 Q. B. D. 38.

³ I stated this violent alteration of the law in my *Law of Shipping* in 1860. I had already written the paragraphs in the text, when the following opinion of Lord Blackburn met my notice. *Anderson v. Ocean Steamship Co.*, 54 L. J. (Q. B.) 192; 10 App. Ca. 107, being an action by the shipowner against the shipper for general average contribution, the first paragraph of the statement of claim was as follows:—"In consideration that the plaintiffs at the request of the defendants had taken on board a ship of the plaintiffs called *The Achilles* certain goods of the defendants to be carried on board of the said ship from Hankow to London, the defendants

promised that they would contribute and pay their just share and proportion in respect of the said goods of any general average loss that might arise or happen to the ship during the said voyage," &c.

Lord Blackburn, in moving the judgment of the House, said, "I think that the promise stated in the first paragraph of the statement of claim is one that would be implied by law in every contract for the carriage of goods." His lordship then gives, what is, and seems intended to be, an exhaustive statement of the forms under which the question might be raised between the parties. There was the form adopted in the case before the House; or the shipowner might have retained the goods under his lien and then the shipper might have brought trover for his goods; or the parties might have referred the question to an average adjuster as arbitrator between them.

In the United States, the rule against contributing for jettison of deck cargo is strictly applied in all cases, without any exception in favour of local or trade usage.¹

Goods of which no bill of lading.

Goods of which there is no bill of lading are strictly excepted by the law of France from the advantages of general average, although jettisoned for the general benefit.² The reason of this seems to be the assumption, that such goods are on board in fraud of the shipowner, and, consequently, no legitimate part of the adventure. There is no such enactment in this country: and the practice of the adjusters is, on proof that the goods were honestly on board and jettisoned, to allow for them in general average. In case goods were jettisoned that had been on board fraudulently, our law might possibly be found to be the same as that of France.

Goods put out into lighters.

Where in the course of the voyage, in order to save a ship from foundering, to float her after stranding, or to enable her to make a port of distress, part of the cargo is put into boats and lighters, and lost before reaching the shore, such loss gives a claim to general average contribution;³ for it is regarded as though it were a jettison (*proinde si jactura facta esset*),⁴ being an intentional exposure of the goods to imminent and extraordinary risk, with a view to the safety of the adventure.⁵ Against this, it may be said that they are exposed to one risk in order to escape another and perhaps a greater risk. That implies one of two things; either that the circumstances supposed are those of wreck, and then there is no general average *mais saurait qui peut*; or that the goods are

¹ *Cram v. Aiken*, 13 Maine, R. 229; (*nomine*, 1 Shepley, R. 229); *Lenox v. United Ins. Co.*, 3 Johns. c. 178, 179; *Smith v. Wright*, 1 Caines, R. 43; *Dodge v. Bartol*, 5 Greenleaf, R. 286; 2 Phillips Ins., no. 1282.

² *Co. de Com.*, no. 420; see also the Prussian Code, s. 1861; Bal-

dasseroni, tom. iv. tit. 5, s. 36.

³ 1 Emerigon, c. xii. s. 41, p. 599;

⁴ Benecke, *System des Assecuranz*, 56, 57.

⁵ Dig. lib. xiv. tit. 2, f. 4.

⁶ Benecke, *Pr. of Indem.* 178. *Accord. Lewis v. Williams*, 1 Hall, 437 (New York).

exposed for the benefit of the adventure, in which case such exposure is the alternative of total loss, and the supposition therefore is of the very circumstances which form the conditions of general average.

If the boat employed on a general average service, *e. g.*, in taking out the goods, be one of the ship's boats, the boat, as well as the goods, must be contributed for, if lost.¹

If, however, in the case supposed, the ship and the rest of the cargo be lost, no contribution is made in respect thereof by the goods thus exposed in the boat or lighter for the general welfare, even though they themselves arrive safe; for, as they do not owe their preservation to the loss of the ship, they cannot be liable to contribute for such loss.²

On the contrary, if there be a loss of the goods put into lighters or boats, but they were taken out of the ship with no idea of thereby saving the ship and the rest of the cargo, although in fact the ship and cargo do not perish, there is no right to contribution on account of the goods.³

If the goods be thus hazarded, not to rescue the ship from any extraordinary or impending danger, but in the usual course of the navigation, being necessarily sent on in boats or lighters from the ship to the port of destination, their loss gives no claim to contribution.⁴

If goods be voluntarily and without fraud given up to pirates, &c., by way of composition, the loss thence arising is a general average loss; for the goods in such case are as much sacrificed for the general safety as though they were jettisoned.⁵ If forcibly taken by pirates or plunderers,

Composition
to pirates.

¹ 1 Emerigon, c. xii. s. 41, p. 599.

² Co. de Com., art. 427; Benecke, Pr. of Indem. 212, 213; see also the Guidon, c. 5, art. 28; "Car il n'y a avec qui contribuer."

³ Whitteridge v. Norris, 6 Mass. 125; see 2 Parsons, Ins. 214. Mr. Phillips (Ins. no. 1289) deems this case to be in conflict with Lewis v.

Williams, 1 Hall, 437, and supports the principle of the latter decision. Mr. Parsons distinguishes and accepts both.

⁴ Valin, tit. des Avaries, p. 162, 163, 167; Benecke, Pr. of Indem. 178.

⁵ Hicks v. Palington, Moore, 297.

it is otherwise, there being then no voluntary submission to loss.¹

Damage
incidental to
jettison.

On the ground that the accessory follows its principal, all damage necessarily caused to other goods or to the ship by the jettison, itself gives a claim to general contribution.² Thus, if holes are cut in the ship in order to get goods or stores out for the sake of lightening her;³ or if water go down the hatches whilst they are open for the purposes of the jettison, and damage the cargo in the hold;⁴ or if goods, after being brought up on deck in order that other less valuable goods stowed beneath them may be jettisoned, are themselves washed overboard or damaged by the sea, the loss is in either case a general average loss.⁵ So, as we have seen, where water is thrown down a ship's hatches to extinguish an accidental fire, and other goods are damaged thereby.⁶

Loss of
freight.

On the same principle the freight, which but for the jettison the shipowner would have received for the goods jettisoned, must be made good to him by a general average contribution.⁷

Goods jetti-
soned are not
abandoned.

Goods jettisoned still belong to their former owners, and, if recovered from the sea, may be reclaimed by them on

¹ Nesbitt v. Lushington, 4 T. R. 783.

² See as to the practice in this country, Baily, General Average, 59—61; see also Co. de Com. art. 400, s. 5; 1 Emerigon, c. xii. s. 41, p. 601; 2 Phillips, Ins., no. 1286; Lowndes, Gen. Av. 52.

³ Benecke, Pr. of Indem. 177, 178; Stevens on Average, 12.

⁴ It seems there is a tendency in practice to disallow this head of damage, on the ground of the practical difficulty of showing what damage is due to the cause in question, and what to the effects of a leak. It is

only in cases of damage likely to recur often, and then of a trivial character, that the law recognises the existence of any such difficulty; otherwise it requires each case to be dealt with on its merits as they appear upon the evidence. On the Continent they divide the damage,—*ob difficultatem probandi*, and call this the *judicium rusticorum*.

⁵ Benecke, Pr. of Indem. 213.

⁶ Ante, p. 850.

So in the United States, see post, p. 867, note 5.

⁷ Benecke, Pr. of Indem. 178; 2 Phillips, Ins., no. 1287.

paying the salvage expenses. *Res jacta domini manet nec fit adprehendentis, quia pro derelicto non habetur.*¹

In cases of absolute necessity, when the master in a foreign port has no other means of raising money, he may sell part of the cargo for the purpose of procuring funds. This right is recognised and sanctioned alike by the earliest and most recent codes of maritime law,² and by the jurisprudence of our own country.³

Sale of part
of cargo.

If the sale be to provide for an expenditure become necessary in respect of a single interest, the duty of recouping the owner of the goods falls upon the owner of that interest. For instance, if it be to provide those necessary repairs which the shipowner is bound to make by the very contract of affreightment, the loss is not an object for a general average contribution, but must be made good by the shipowner alone, to the owner of the goods so sold.

Thus, a ship was forced to put back into port to repair the accidental damage done to her by a storm, and the master, having no other means of raising money, sold part of the cargo to defray the expense of the repairs; the Court held that the owners of the goods so sold could not recover against their underwriters a rateable proportion of the loss they had so incurred, but must make their claim against the shipowners alone.⁴ So, where the captain of a ship, having been

Powell v.
Gudgeon.

¹ Dig. lib. xiv. tit. 2, f. 8; 1 Emerigon, c. xii. s. 40, p. 596.

² See the *Judgments d'Oleron*, art. 22; 1 Pardessus, *Lois Mar.* 399; *Laws of Wisbuy*, art. 39, cited as 44 in 1 Pardessus, 480; the *Consolato del Mare*, c. 105 of the Italian translation, c. 62 in the original Catalan, see 2 Pardessus, *Lois Mar.* 110; see also the *Co. de Com.*, art. 234; 2 Nolte's *Benecke*, 605.

³ See the famous case of *The Grattitudine*, 3 C. Rob. Adm. R. 240; *MacLachlan, Shipping*, 155 *et seq.*

⁴ *Powell v. Gudgeon*, 5 M. & Sel.

431; *S. P.* in *Sarquy v. Hobson*, 4 Bingh. 131; acc. *Hallett v. Wigram*, 9 C. B. 580; 19 L. J. (C. P.) 281. This was an action by the shippers of goods against the shipowners, where the pleadings distinctly raised the question; and the Court of Common Pleas held that no claim for general average arises when the master of a ship has been obliged to sell part of the cargo for the purpose of executing repairs made necessary by ordinary perils of the sea. Accord. *German Code*, art. 709.

*Dobson v.
Wilson.*

arrested in a foreign port for the necessary repairs of his ship while she lay there, sold part of the cargo in order to procure his liberation: Lord Ellenborough held, that the sale of the goods under these circumstances was not a sacrifice for the joint benefit of ship and cargo, and therefore could give no claim to a general average contribution.¹

On the contrary, a claim to general average contribution would be sustained when the sale was to repair such losses as the expense of making a port of distress to refit, or of replacing masts, cables, &c., sacrificed for the general safety,² which themselves come into general average.³

If the goods are sold for a smaller sum at the port of refuge than they would have fetched at the port of destination, then, in case the vessel ultimately complete her voyage, the difference, being a loss, is an average or a general average loss, according as the principal moneys would have to be repaid by a particular interest, or by the whole expedition.⁴

So much as to a sacrifice of cargo, and the loss resulting therefrom; we turn now to consider a sacrifice of part of the ship or her tackle and furniture.

*Sacrifice of
part of the
ship.*

If part of the ship be sacrificed—masts cut away, anchors heaved overboard, cables cut, gun and ship stores jettisoned for the general safety, it is contributed for in general average.⁵

*Cables and
anchors.*

If cables are cut or anchors abandoned, in order to avoid a peril involving a total loss, as for the purpose of putting to sea in order to escape a lee shore in a gale of wind, this is a general average loss.⁶

Cables cut away or anchors slipped to avoid being sepa-

¹ *Dobson v. Wilson*, 3 Camp. 480. The action was brought by one owner of goods against another.

² *Stevens on Average*, 15; *Benecke*, Pr. of Indem. 261—275.

³ *Hallett v. Wigram*, 9 C. B. 580.

⁴ *Ibid.* 580; 19 L. J. (C. P.) 281.

⁵ 1 *Emerigon*, c. xii. s. 41, p. 606;

Co. de Com. art. 400; Hamburg Ord. tit. 21, art. 9, No. 7; Prussian Code, s. 1788; German Code, art. 702; Stevens, Av. 13; Bailly, Gen. Av. 64—72; Lowndes, Gen. Av. 56.

⁶ 2 *Phillips, Ins.*, no. 1295; 1 *Magens*, 345, case 27; *Bailly, Gen. Av.* 67.

rated from convoy are not the subject of general average contribution in this country,¹ though they are so on the Continent,² and in the opinion of Mr. Phillips it would be so in the United States.³

Where the ship, in order to avoid capture, or a lee shore, casts anchor in a foul and rocky bottom in some unusual place of anchorage, and the cable is consequently chafed asunder by the friction, or the anchor so firmly wedged that it cannot be weighed, it has been a subject of great discussion, especially among the German lawyers, whether the damage thus occasioned be a general average loss. It appears that in practice it is frequently adjusted as such;⁴ but on principle, as the damage thus occasioned was not intended or anticipated as the result of the act,—as it was directly caused not by the agency and will of man, but by the force of the elements, it ought not to be considered a general average loss.

If, in similar circumstances, the ship is compelled to cut her cable, from the impossibility of weighing the anchor, the loss may or may not be general average, according to circumstances. If cut in order merely to enable the ship to pursue her voyage and not under the pressure of any urgent peril, it is not general average; the severance is the cutting away of what was already lost. But if it were said that the severance is made to prevent the ship drifting ashore, or to avoid capture, it is implied that the anchor and cable are not lost, but could be recovered, if there were time; therefore, as the loss is voluntary in order to escape the greater loss of the whole adventure, it is general average.⁵

¹ *Stevenson Average*, 14; Lowndes, *Gen. Av.* 64.

² 1 *Emerigon*, c. xii. s. 41, p. 606; *Baldaasseroni*, tom. iv. p. 83.

³ 2 *Phillips, Ins.*, no. 1308, referring to *Casaregis Disc.* 46, n. 9.

⁴ *Weekett*, tit. *General Average*, no. 6; *Weijteen*, s. 8.

⁵ This distinction is approved as well founded by the Courts of the

United States, who, in cases where fire is extinguished either by scuttling the ship or pouring water down the hold, distinguish the goods already on fire which could not have been saved, and goods in the ship, not on fire, which are damaged by water. See *Nelson v. Belmont*, 5 *Duer*, 310; *Lee v. Grinnell*, *ibid.* 400; *Crockett v. Dodge*, 3 *Fairf.* 190; per *Story, J.*,

Conversion
to a different
purpose.

If any part of the ship or her tackle be cut up for the rescue of the common adventure and applied to some purpose different from its ordinary use, the loss thence arising is a general average loss;¹ as if spars are cut up to construct a rudder, or sails and cordage used to stop a leak,² or to keep down a leak by using them as fuel in the donkey engine.³ Or if, to prevent a ship from being blown off by the fury of the storm and sunk on the bar of the harbour, the master cut the cable of his best bower anchor and with that fasten her to the pier; the damage in these cases would be a general average loss.⁴

Or, without cutting up tackle, if it be applied to such a different use from that for which it was intended as exposes it to extraordinary risk by reason of its unsuitableness, the consequent loss will be general average. Thus, if an anchor is dropped to prevent a ship driving higher up the beach, or to check a vessel while under full sail and driving into collision with another or upon a lee shore, the loss of the cable is general average.

Sacrifice.

Sails deliberately let go, or masts cut in order to right a vessel when she is on her beam ends, are made good by a general average contribution.⁵

Not sacrifice.

It is otherwise if sails or spars be carried away by the wind, in consequence of crowding sail to escape an enemy or a lee shore. Such a use being within the compass of the shipowner's duties under the contract of affreightment, the loss consequent thereupon falls on the shipowner.⁶

A merchantman, after having struck to a privateer, took

Col. Ins. Co. v. Ashby, 13 Pet. 340;
2 Parsons, Ins. 234.

See per Willes, J., in Chapman v. Johnson, 35 L. J. (C. P.) 23, cited post, p. 875.

¹ Stevens on Average, 15.

² 2 Phillips on Ins. no. 1299;
Baily, Gen. Av. 73, 74.

³ Harrison v. Bank of Australasia,

L. R. 7 Exch. 39; Robinson v. Price,
2 Q. B. Div. 91.

⁴ Birkley v. Presgrave, 1 East, 220;
Marshall v. Dutrey, 2 Marshall, Ins.
546.

⁵ Benecke, Pr. of Indem. 185;
Baily, Gen. Av. 64.

⁶ German Code, art. 709, 3.

advantage of the wind, which prevented the privateer boarding, to escape by hoisting an extraordinary press of sail, but, in so doing, was much strained and injured, and carried away her mainmast; this was held not to be a general average loss.¹ The Cour Royale of Rennes, in 1822, came to a similar decision with regard to sails carried away in attempting to escape a lee shore; and Boulay-Paty, citing both cases with approbation, gives the true reason, that these manœuvres form part of those ordinary exertions which the shipowner is bound by his duty to the freighters to make.²

Upon the same principle it has been decided in England that damage done to the ship by fighting is not a subject of contribution. Thus a merchantman, carrying six guns, was attacked by a privateer, and, after a gallant resistance, beat her off, but had two of her men killed, several wounded, was severely damaged by the enemy's shot, and had expended a considerable quantity of ammunition; but the Court held that the expense of curing the wounded, or repairing the damage, or of replacing the ammunition, was not an object for general average contribution.³ It was customary in those days of naval warfare not only to arm merchantmen, but also to make the arms which they carried a matter of representation to the freighters as well as to the insurers. To both, therefore, the shipowner thus assumed the duty of fighting, at all events with a view to escape.

Damage to
a ship by
fighting.
Taylor v.
Curtis.

Boats cut away from the ring-bolts, or other usual fastenings, and heaved overboard under stress of weather, are a general average loss;⁴ and they are now allowed for, if cut from the quarters, so much is it the usage to carry them so slung. On the contrary, it is said, they would be disallowed if slung at the stern davits, unless it were shown that the

Boats.

¹ Covington v. Roberts, 2 B. & P. N. R. 378.

² Boulay-Paty on Emerigon, vol. i. p. 620.

³ Taylor v. Curtis, 6 Taunt. 608;

² Marsh. Rep. 309; S. C., 4 Camp. 334.

⁴ Stevens on Average, 14; Benecke, Pr. of Indem. 187.

boat was in request for use, and was only slung there during the intervals of employment.¹

Damage to
ship for
cargo.

Damage to the ship in order to extinguish the spontaneous combustion of part of her cargo has been held in France not to give a claim to contribution.²

Spontaneous
combustion.

In England there are some peculiarities of practice in cases of this nature which at first sight appear to be somewhat arbitrary;³ but the cases, as far as they have gone, show that such damage is by our law regarded as general average,⁴ and the Courts of the United States are clear in their decisions to the same effect.⁵

Damage deliberately done to the ship otherwise than by water, for instance, by cutting the deck or boring to scuttle, is in ordinary practice allowed as general average.⁶ Allowance is also made for sound cargo which is thrown overboard in the effort to get at that which is on fire; even this, however, is allowed with a difference; that is to say, for cotton in bales thus thrown overboard there is allowance, but for coals in bulk there is none.⁷

Voluntary
stranding.

Where the ship is voluntarily run ashore to avoid capture, foundering, or shipwreck, and is afterwards recovered so as to be able to perform her voyage, the loss resulting from the stranding is held by the older writers and in America to be general average. This is the conclusion adopted by Emerigon, after exhausting all the learning that could be collected on the subject at the time he wrote,⁸ and by Chancellor

¹ Baily, Gen. Av. 66. Sed quære of this; much would depend on the circumstances of the case.

² 1 Emerigon, c. xii. s. 17, p. 430; *Crockett v. Dodge*, 3 Fairf. (U. S.) Rep. 190.

³ See for instances, Baily, 75, 82. The Court of Q. B. was obliged to animadvert upon such practice in *Stewart v. W. I. and Pacific S. S. Co.*, 42 L. J. (Q. B.) 84.

⁴ Ante, p. 850, note.

⁵ See the cases cited ante, p. 867, n. 5.

⁶ Stevens, 42; Benecke, Pr. of Ind. 243.

⁷ If the distinction made refer to cargo already lost, or such as cannot be saved, then it coincides with the basis of the decisions in the United States referred to, ante, p. 867, n. 5.

⁸ 1 Emerigon, c. xii. s. 13, p. 405, 600, referring to *Consolato del Mare*, c. 192, 193 (that is the 150th c. of ed.

Kent in the United States,¹ where it has received the sanction of several decided cases.

Mr. Stevens' opinion is to the contrary, chiefly on the ground that the object in view is not the general safety of the whole adventure, but only the safety of the cargo purchased by the destruction of the ship.² Mr. Benecke, in pursuance of a theory on which we have already observed,³ is of opinion with Mr. Stevens, only in the excepted case where the situation of the ship at the time of the loss is so desperate as to leave no other alternative.⁴

In practice, the average adjusters in this country, according to Mr. Bailly, exclude this description of loss from general average.⁵

Where, however, the ship is lost, in consequence of the stranding, but the cargo saved, does that which is so saved contribute in general average for the loss of the ship?

Ship lost by
voluntary
stranding, but
cargo saved.

On this question there has been a great diversity of opinion among legislators and jurists.⁶ The Roman law provided generally that the goods saved should not contribute for the loss of the ship. *Amissæ navis damnum collationis consortio non sarcitur per eos qui merces suas naufragio liberaverint.*⁷ Voet, however, in commenting on this passage, expressly says, "That if the ship be voluntarily run ashore for the common safety, and thus has perished, the goods being saved, contribution is due."⁸ The *Consolato del Mare*,⁹ in case of the

par Pardessus; see *Lois Maritimes*, vol. ii. p. 166; *Roccus de Navibus*, note 60; *Targa*, c. 76, p. 317; *Casa-regia*, Disc. 19, no. 18; Disc. 46, no. 61.

¹ In the case of *Bradhurst v. Columbian Ins. Co.*, 9 Johnson's Rep. 9. See also the other cases cited 2 Phillips, Ins. no. 1313.

² Essay on Average, 34, 55.

³ Ante, p. 849.

⁴ Benecke, Pr. of Indem., 219.

⁵ Bailly on General Average, 41, 75, 76. Mr. Bailly admits that in many cases this rule will operate inequitably, but considers it well

adapted to prevent disputes as to facts, i. e., as to the extent of damage done to ship and cargo by the stranding, and the extent of damage done to them irrespective thereof.

⁶ See an elaborate account of the state of the question in Pardessus, *Lois Maritimes*, vol. i. p. 140, and vol. ii. p. 21, chap. xii. *Introduction to the Consolato del Mare*.

⁷ Dig., lib. xiv. tit. 2, f. 5.

⁸ Voetius ad Pandect., loc. cit.

⁹ Cap. 193 of the Italian translation; cap. 150 of the Catalan original; Pardessus, *Lois Maritimes*, vol. ii. p. 167.

ship's being wrecked (*brisé*) by the voluntary stranding, provides that the goods saved shall contribute for the damage done to the ship. The case is not expressly provided for by the other mediæval sea laws.

Emerigon, after laying down the general doctrine that in case of voluntary stranding the goods saved contribute for the damage done to the ship, adds to it this limitation:—"Provided always that the ship shall have been set afloat again; for if the stranding be followed by the wreck of the ship, it is then *sauve qui peut*."¹ Bynkershoek disapproves of this doctrine, and holds that the loss of the ship, like the loss of her tackle, is a general average loss, where she has been sacrificed by a voluntary stranding for the common safety.²

In the United States.

The question has frequently been before the American Courts, and for some time was variously decided there, until at length it was fully considered, and perhaps quieted once for all, by the judgment of Story, J., in the case of the *Columbian Insurance Co. v. Ashby*.³ In that case, this learned judge, after examining all the learning on the subject, from the Digest downwards, decided that a voluntary stranding, followed by a total loss of the ship, but with a saving of the cargo, constitutes, when designed for the general safety, a clear case of general average, in which the owners of the cargo are liable to contribute for the loss incurred by the ship and freight.⁴

The facts of the case were these:—The brig *Hope*, going down Chesapeake Bay, found the weather too bad to proceed to sea, and bore away for a projecting headland in the bay called Sewell's Point, where she anchored. On the second and following day the gale increased in violence; the brig

¹ 1 Emerigon, chap. xii. s. 41, p. 600.

² *Quæstiones Privati Juris*, lib. iv. c. 22.

³ 13 Peter's Supreme Court Rep. 331.

⁴ Chancellor Kent, who as a Judge

had elaborately expressed a different opinion (in the case of *Bradhurst v. Columbian Ins. Co.*), in his *Commentaries* states the law to have been finally settled in the United States by the judgment of Mr. Justice Story. See 3 Kent, Comm. 239, note.

dragged her anchors from time to time, till finally she struck on the shoals, and, her head swinging round, brought her broadside to the wind and a heavy sea. In this situation the captain, finding no other possible chance of saving the ship and cargo, and preserving the lives of the crew, slipped his cables, and ran the brig ashore, as far up the beach as possible, where, after the storm, she was left high and dry, and there was no possibility of getting her off. The cargo was saved. The Court held, that the owners of the cargo were bound to contribute to the owners of the ship and freight for the loss upon both interests caused by the stranding.

In the course of his very elaborate judgment, Story, J., thus states succinctly the grounds of his decision:—"The intention is not to destroy the ship, but to place her, as well as the cargo, in less peril, if possible. The act is hazardous to the ship and cargo, but is done to escape from a more pressing danger; it is done for the common safety; and if the salvation of the cargo is accomplished thereby, it is difficult to perceive why, because, from inevitable calamity, the danger has exceeded the expectation or intention of the parties, the whole sacrifice should be borne by the shipowner when he has thereby accomplished the safety of the cargo."

Of this question also, it remains to be said that it has never yet been presented for judicial decision in the Courts of this country. Mr. Arnould however says, there seems little doubt that they would hold, in conformity with the great body of previous authorities, that, at all events where the ship is recovered, the loss arising therefrom gives a claim to a general average contribution.

Mr. Arnould's
opinion.

Notwithstanding those authorities and this opinion, if there is still any room left for doubt, I must be allowed to express the doubt which I entertain. The case is necessarily a hypothetical one, and, as necessarily, a case of the most hopeless character. The circumstances, actual or supposed, attendant on voluntary stranding are so closely allied to those of wreck, that it will always be easier to assert than

Voluntary
stranding not
a case of
General
Average.

show a difference. The condition of the whole adventure is confessedly desperate; and recourse is had to that which cannot be called, for it is not even hoped to be, an alternative. Whether the result may be the destruction of the whole, or the saving of something, is a mere chance that defies ingenuity or calculation. The act of putting the helm about to accomplish it is a blind throw for life. The whole adventure is the stake played. And to risk the whole upon the turn of a die does appear to be utterly reckless, and not to be justified in view of the law except under the desperate circumstances of wreck. In that view of voluntary stranding, the resulting loss, although something be saved, cannot be allowed to be general average.¹

The distinction made by the older authorities, and adopted by Mr. Arnould, between the case in which the ship perishes and that in which she is ultimately saved, seems to rest upon the view, now discarded in modern practice, that success is a necessary condition of any sacrifice in order to its being allowed to be general average.

Wreck.

Wreck, when it consists, for instance, of undamaged sails and spars attached to a mast which has been blown over a vessel's side, and, remaining still attached to the vessel, is cut away because it impedes the navigation or also endangers the common safety, is not allowed by adjusters in general average.² The same principle has been laid down as applicable to cargo when in a state of wreck, that is to say, when it is adrift in the hold, and thereby becomes a cause of such danger that it is necessary to throw part of it overboard.³ This opinion seems to be affected by the decision which was given in a case respecting the jettison of deck cargo. The vessel was laden with timber under and over deck. In the course of the voyage the deck lading broke loose during a storm and rolled upon the pumps, so as

¹ Such, accordingly, seems to be the practice among adjusters; Lowndes, *Gen. Av.* 74, 78.

² Baily, p. 65.

³ Baily, pp. 56, 58.

to impede the working of them; as the storm increased, and the deck lading could not be stowed again in position, part of it was thrown overboard; but whether this could be allowed in general average was the question.

In the opinion of the Court, the jettison of deck cargo under these circumstances ought to be allowed in general average.¹ Willes, J., in delivering the judgment of the Court, says:—"By our decision we do not at all mean to throw doubt upon the propriety of the practice of average staters in disallowing for that which is properly called wreck. The question is, what is wreck? If a mast were sprung, and a part of it were to go overboard with a quantity of spars and sails attached to it, hanging on by a stay which must give way in a minute or two, whilst in the meantime, by battering against the side of the vessel, it adds to the danger, and if the stay were cut to let it go at once, it would be very difficult to say that that was anything more than wreck. A lawyer could not lay down as a matter of pure law, that all lumber cut loose is wreck. But what I say is, if it was virtually lost, if not recoverable, if the act of cutting the rope was only hastening the moment at which it would be lost, you would properly call that wreck, and you would not say it was general average. The reason given is because you cannot keep it. There is no intentional sacrifice in cutting it away. You must lose it, and the losing it a minute or two sooner can make all the difference of its doing great injury or not; but you cannot help losing it."²

In *Shepherd v. Kotgen*,³ the ship *Rollo* with a general cargo on board, bound for Hong Kong, encountered a heavy storm between Scilly and Lisbon, which carried away the starboard main rigging. After that the mainmast was lurching violently and threatened to open the ship, or rip open the deck. As soon as the starboard rigging was gone, and

¹ See accord. *Corry v. Coulthard* [not reported], stated in *Shepherd v. Kotgen*, 2 C. P. D. 583; and see *ibid.*, p. 591.

² *Johnson v. Chapman*, 35 L. J. (C. P.) 23, 26, 27, 28, 29.

³ *Shepherd v. Kotgen*, 2 C. P. D. 578, and on appeal, 585.

What is
wreck.

could not be repaired in consequence of the weather, it was seen that the mast was gone; it was as good as a wreck. In these circumstances the mate, by the master's orders, cut away the port main rigging, and the mast went overboard, this event being accelerated by that operation to the extent of a minute or two. The action was by the shipowner against one of the cargo owners for a general average contribution.

On appeal, Bramwell, L. J., says: "The mast was in such a state that it must have been lost whether the vessel got safely to port or not. Consequently there was no sacrifice of it when it was cut away, and the plaintiff has no claim for contribution."

Brett, L. J., in the same case, states the question in point of form thus:—"If anything on board a ship is cut or cast away because it is endangering the whole adventure, is in such a state or condition that it must itself certainly be lost, although the rest of the adventure should be saved without the cutting or casting away, then the destruction of the thing gives no claim for general average;—or thus:—Where, whether the act relied upon as the act of sacrifice had been done or not, the thing in respect of which contribution is claimed would, by reason of its own state or condition, have been of no value whatever, or would have been certainly or absolutely lost to the owner, although the rest of the adventure had been saved, there is nothing lost to the owner by the act, and therefore there is nothing sacrificed, that is to say, there is no sacrifice;—or thus:—There is nothing in respect of which a general average contribution could be claimed, because the thing in respect of which the contribution is claimed was, when the act relied upon was done, of no value whatever to the owner."¹

Extraordi-
nary expendi-
ture.

Having enumerated those cases of general average loss which arise out of *sacrifice*, we proceed now to consider those which are founded on *expenditure*.

¹ *Shepherd v. Kotgen*, 2 C. P. D. 590.

There are two main questions which determine whether any given expenditure ought to found a claim to contribution in general average. 1. Was it of an extraordinary nature? In other words, was it anything more than one of those ordinary disbursements of the voyage which are necessary for keeping the ship in a proper condition to transport the cargo, and which the owner of the goods has therefore a right to demand of the owner of the ship, without being called on to contribute towards their payment? 2. Even supposing the expenditure to have been of an extraordinary nature, was it also incurred for the safety of both ship and cargo?

If the answer to both these questions be in the affirmative, the expenditure ought, on principle, to be made good to the party who has incurred it, by those who have benefited by it: in other words, it should be regarded as a general average loss. If either or both be answered in the negative, then the expenditure either comes under the head of those petty averages which the shipowner himself must bear without any claim on his underwriter, or it constitutes a particular average loss, for which the underwriter on the ship or on freight is liable.

If a ship in consequence of injuries sustained at sea is obliged for the safety and preservation of ship and cargo to put into a port of refuge for repairs, all the expenses necessarily incident to her putting in, have always in this country been allowed as general average; and if something were still necessary to deliver ship and cargo together as parts of the whole adventure from common danger, after reaching port, the expense of that also was added to general average. It was argued, however, that as soon as the common danger had ceased, general average also ceased; and this in contradistinction from the Continental and American practice and law of general average, which contemplates the final arrival of the adventure at its port of destination as that which ought to determine the range and scope of general average.

Expense of
making a port
to refit.

The questions involved in the above general statement of assumed facts, have been the subject of recent judicial investigation and decision with this result, that a discrimination, altogether unnecessary within the limited view hitherto entertained, has been made in the nature of the distress originally creating the necessity for seeking a port of refuge, and as a consequence, with a difference of limit and range as to the expenses to be attributed to general average.

A ship in consequence of damage voluntarily done to her at sea for the preservation of both ship and cargo, damage therefore which is the subject of general average, is compelled thereby to make for a port to refit, and when in such port is further compelled in order to make the necessary repairs, themselves attributable to general average, to unload and warehouse the cargo;—in that case it is held that the ship-owner is entitled to recover [repairs are not here in question] the expense of entering the port, of unloading, warehousing and reshipping the cargo, and also of leaving the port in further prosecution of the purpose of the original adventure.¹

If a ship at sea is so damaged by sea perils that she is obliged for the preservation of ship and cargo to make for a port of refuge, the whole of the expense proper to her putting into such port is attributable to general average, although the damage to ship is fortuitous damage, and the repairs therefore are not attributable to general average. After she has got into port, if the common danger continue until the cargo is unloaded, or if the repairs of the fortuitous damage cannot be done until the cargo is unloaded, then in either of these cases the expense of landing the cargo is a general average expenditure. But if in this same case the cargo is landed for the advantage of the ship only, or of the cargo only, the expense of this landing is not a general average expenditure. In such a case of fortuitous damage to ship at sea, all subsequent expense incurred for the reloading of

¹ *Attwood v. Sellar*, 4 Q. B. D. 342; 5 Q. B. D. 286 (C. A.).

cargo, and for leaving the port, is expenditure not attributable to general average.¹

The question whether the expense of repairs should come into general average would depend entirely on the nature of the loss which rendered such expense necessary. If the damage to be repaired were in itself a general average loss, the cost of repairing it would be so too. But the cost of repairing damage accidentally caused to the ship by the perils of the sea can never, on principle, give a claim to contribution, seeing such repair is a duty of the owner under the contract of affreightment.²

The costs of the repairs.

Accordingly, we find, even in the Digest itself, an express decision that the expense of such repairs can give no claim to general average;³ and the greatest of all writers on insurance law lays it down, without any limitation, that if a ship, unable to keep the sea, puts into port in order to repair the damage done to her by a storm, the expense of the repairs themselves ought not to be the subject of general average contribution.⁴

It is surprising there should ever have been any doubt upon a matter which on principle is so plain;⁵ but any doubt existing in this country and America seems principally to have arisen out of a misconception of the following case:—A ship in the prosecution of her voyage met with a particular average loss by fouling, in consequence of which she was obliged to cut away part of her bowsprit rigging (a general average loss); she was so much damaged by the effects of the accident and the cutting away, that she could not keep the sea, nor pursue her voyage without repairs, and she accordingly put into port to refit.⁶

Plummer v. Wildman.

In deciding this case, the language of Lord Ellenborough is so indefinite and so inaccurate, that nothing would justify

¹ *Svensden v. Wallace*, 11 Q. B. D. 616; 13 Q. B. D. 69, 76, 77.

² *Boulay-Paty*, *Comment. on Emerigon*, vol. i. p. 620; *Benecke*, *Pr. of Indem.* 194; *Lowndes*, *Gen. Av.* 6.

³ *Dig.*, lib. xiv. tit. 2, f. 6.

⁴ 1 *Emerigon*, c. xii. s. 41, p. 608.

⁵ *Stevens on Average*, 40.

⁶ *Plummer v. Wildman*, 3 M. & Sel. 482.

any reference to it but the fact that the Courts of the United States have founded upon it in their decisions, and enlarged the limits of general average far beyond any definition admitted in the English Law. "It is not so much," says Lord Ellenborough, "a question whether the first cause of the damage was owing to this or that accident, to the violence of the elements, or the collision of another ship, as whether the effect produced was such as to incapacitate the ship, without endangering the whole concern, from further prosecuting her voyage, unless she returned to port and removed the impediment. As far as removing the incapacity is concerned, all are equally benefited by it, and therefore it seems reasonable that all should contribute towards the expenses of it; but if any benefit *ultra* the mere removal of this incapacity should have accrued to the ship by the repairs done, inasmuch as that will redound to the particular benefit of the shipowner only, it will not come under the head of general average."

Accordingly this language seems to form the basis of the rule which has been adopted on the subject in the United States,¹ directly opposed though it be to the general principles above laid down.²

The terms cited from this case have in a way so indefinite mixed up fortuitous and voluntary damage, particular and general average expenses, and provided for a general resultant such as is not known to English Law, that, except for the authority conceded to it in the United States, the case would be wholly unworthy of being referred to.

Wages and provisions during repairs.

Moneys paid for wages and provisions for the crew during the delay for repairs in a port of distress, give no claim either for general³ or for particular average, but fall exclusively on

¹ 3 Kent, Comm. 236; 2 Parsons, Ins. 253, note.

² Benecke, Pr. of Indem. 197; Phillips on Ins., vol. ii. p. 115.

³ See Jackson v. Charnock, 8 T. R.

509; Plummer v. Wildman, 3 M. & Sel. 482; Power v. Whitmore, 4 M. & Sel. 141, in all which these charges were claimed as general average and disallowed.

the shipowner, because he is bound by the contract of affreightment, and as part of the consideration for freight, to keep a competent crew on board from the commencement to the end of the voyage.¹ "The labour of the sailors," says Boulay-Paty, "while the ship is repairing, and their wages and provisions while so occupied, form part of those expenses and exertions to which the shipowner is bound by the relation in which he stands to the owner of the goods."²

In one English case, indeed, where a ship put in to refit in consequence of a particular average loss, and the crew were discharged immediately on her entering the port of distress, but afterwards hired by the master to work at the repairs, not as sailors, but as common labourers, it was held that their wages and provisions during the delay to refit might be brought into general average.³ This case, so destitute of anything like the support of principle, must now be considered as expressly overruled.⁴

The rule of the French Code is, that these expenses are In France.
general average, provided the loss to be repaired was voluntarily incurred for the common benefit, and the ship freighted by the month.⁵ In the United States they, in all cases alike, In the United States.
come into general average;⁶ and on the Continent are

¹ See *Lateward v. Curling*, 1 Park, Ins. 288; *Eden v. Poole*, *ibid.* 117; *Robertson v. Ewer*, 1 T. R. 127, 132; *De Vaux v. Salvador*, 4 A. & E. 420.

² Boulay-Paty on Emerigon, vol. i. p. 619.

³ *Da Costa v. Newnham*, 2 T. R. 407.

⁴ "In my opinion this case cannot be supported:" per Lord Esher, *Svensden v. Wallace*, 13 Q. B. D. 80.

⁵ Code de Commerce, art. 400, s. 6. The reason given by the French jurists for this last restriction is, that, where the ship is freighted by the month, the shipowner receives no freight for the period of detention, and is therefore not bound by his duty as ship-

owner to pay or provision the crew during the delay; so that the expense caused by doing so is in such case of an extraordinary nature. On the other hand, where the ship is freighted by the voyage, freight is due for the whole period of detention (which is included in the voyage), and the wages and provisions of the crew are, in such case, an ordinary expenditure to which the shipowner is bound; Pothier, *des Chartes-parties*, no. 85. Mr. Benecke considers that when the loss to be repaired was voluntarily incurred, the expense of wages and provisions should be general average in either case; *Pr. of Indem.* 206.

⁶ 2 Phillips, Ins. no. 1328; 3 Kent, Com. 235, note.

generally admitted to be such, although there is hardly any point even in the perplexed doctrine of general average, in which there is such a great diversity in the positive laws of mercantile states.¹

Under
embargo.

So, during detention by embargo, which has not the effect of putting an end to the contract of affreightment, the master is bound by his ordinary duty towards the shipper to stay by the ship with his crew, and the expense he is put to thereby, in having to pay and provision them during the embargo, can give him no claim to general average contribution.²

It is, accordingly, not the subject of general average, either in this country³ or the United States.⁴

Expenses
under deten-
tion by other
causes.
Convoy.

Waiting for convoy in the absence of any certain and impending danger other than the ordinary contingent perils to which all ships are exposed in time of war, does not make the expense of so doing a proper object of general average contribution.⁵ It has been thought if the danger be so actual and imminent as to render the protection of a man-of-war, or a delay in port, absolutely necessary to the safety of the whole adventure, that the necessary expense ought, on principle, to come into general average.⁶

Quarantine.
Ice.

Delay by quarantine in the ordinary course of the voyage gives no occasion to general average.⁷ Nor delay, through being frozen up in any port in the ordinary course of the

¹ Mr. Benecke, in his *Principles of Indemnity* (pp. 191—207), has with great learning collected and commented on all the various laws of the European States on this subject.

² Benecke, *Pr. of Indem.* 234.

³ *Robertson v. Ewer*, 1 T. R. 129. In the case of one of the ships detained by the Russian embargo, Lord Ellenborough seemed to admit the claim, but it is certainly opposed to principle so to do; *Sharp v. Glad-*

stone, 7 East, 34.

⁴ *Penny v. New York Ins. Co.*, 3 Caines, 135; *Leavenworth v. Delafield*, 1 Caines, 573.

⁵ Benecke, *Pr. of Indem.* 225; *Bynkershoek, Quæstiones Priv. Juris*, lib. iv. c. 25.

⁶ Including the wages and provisions of the crew; *Bynkershoek, Quæstiones Priv. Juris*, lib. iv. c. 25; Benecke, *Pr. of Indem.* 225.

⁷ 2 Phillips, *Ins. nos.* 1323, 1324.

voyage, or through being unable to enter a river or harbour on account of floating ice, and she is compelled to put into a harbour and winter there.¹

An expenditure though extraordinary in amount may still be within the line of ordinary duty imposed on the shipowner by the contract of affreightment; and there may be an expenditure, whether small or great in amount, which is beyond the line of such duty, and is therefore extraordinary in its nature: the latter is allowed to be general average, and the former is not.

Expenditure
extraordinary
in its nature.

A large clipper ship with an auxiliary screw, while crossing the ocean with a cargo on board, was so injured by collision with an iceberg as to be disabled entirely to carry sail. The master made Rio by means of her auxiliary screw. Finding when there that complete repairs would cost several thousands of pounds more than in England, and would entail the unshipping of the cargo and considerable delay, he had sufficient repairs done to her in three days, without taking out the cargo, as would carry her home. He then sailed and arrived in England by means of her auxiliary screw, having purchased coals at Rio and again at Fayal at an extra cost to the owner of 1,472*l*. The Court held that the master had done no more than it was his duty to have done, and that no part of the expense for coals could be allowed to be general average.²

Blackburn, J., in the course of the judgment of the Court, said, "The shipowners by their contract with the freighters are bound to give the services of their crew and their ship, and to make all disbursements necessary for this purpose. In the case of such a vessel as this, which is equipped with an auxiliary screw, their contract includes the use of that screw, and consequently the disbursements necessary for fuel for the steam engine. Now the disaster which occurred in this

¹ 1 Magens, 67; Benecke, Pr. of Indem. 214; 2 Phillips, *quâ supra*.

2 Q. B. 203. Accord. in respect of coals, *Harrison v. Bank of Australasia*, L. R. 7 Ex. 39.

² *Wilson v. Bank of Victoria*, L. R.

case no doubt caused the engine to be used to a much greater extent than would generally occur on such a voyage, and so caused the disbursement for coals to be extraordinarily heavy; but it did not render it an extraordinary disbursement. The case is similar to that of an ordinary sailing vessel in which, owing to disasters, the voyage is unusually protracted, and consequently the owner's disbursements for provisions and for the wages of his crew, if they are paid by the month, are extraordinarily heavy. It is not similar to that of the master hiring extra hands to pump when his crew are unable to keep the vessel afloat, or any other expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature."¹

Where therefore a vessel met with heavy weather which continued for many days and the vessel in consequence strained and sprung a leak, and the supply of coals for the donkey engine, which would have sufficed for an ordinary voyage, was exhausted at the pumps so that spare spars and part of the cargo were afterwards necessarily consumed in making steam for the pumps and in saving the adventure; this expenditure was held to be chargeable as general average.²

Expenditure
on services.

Accordingly, remuneration for services become necessary out of regard for the common safety, gives a claim to general contribution, if the services rendered be in their nature extraordinary. Not so, if the services though of an extraordinary nature be required for ship alone, or cargo alone.

Salvage.

Salvage paid to men-of-war for rescuing a ship and her cargo from capture, or to other vessels for extricating them from the dangers of shipwreck, should, it seems, be made good by a general average contribution.³

¹ L. R. 2 Q. B. 212.

² Robinson v. Price, 2 Q. B. Div.
91; Harrison v. Bank of Australasia,
L. R. 7 Ex. 39.

³ Stevens on Average, 25; Benecke,
Pr. of Indem. 230; 2 Phillips, Ins.,
no. 1334.

But the contributor to general average is not necessarily bound by the amount paid by the shipowner: the question is for the jury, and ought to be put to them, whether the whole of the money paid or how much of it was necessarily paid to extricate ship and cargo from the danger they were in.¹

Hire of extra hands to pump a ship after springing a leak, is allowed in general average, both in England² and the United States.³ But the expense of hiring extra hands, in the room of those of the crew who have deserted, is not allowed;⁴ nor are gratuities promised to seamen in order to encourage them to do their duty, for such promise is, in law, entirely void.⁵ Hire of extra hands.

A stranded vessel is, in most cases, in danger of being lost, unless speedy steps are taken for her preservation, either by unloading the cargo to lighten her, or by endeavouring to float her by means of buoys, &c., with the cargo in her. The remuneration which the shipowner is obliged to pay for the services thus rendered, gives a claim to general average contribution, provided such services appear to be for the joint benefit of ship and cargo.⁶ Getting ship afloat for the joint benefit.

If, however, the safety of the ship be hopeless, or that of the cargo no longer endangered, no such claim can be sustained.⁷ Thus, where the ship is driven high and dry on the shore, with no prospect of saving her, the charges of unloading the cargo, not being for the benefit of the ship, and the charges of afterwards digging out the ship, being of no Otherwise, if not for joint benefit.

¹ *Anderson v. Ocean S. S. Co.*, 10 App. Ca. 107. The Lords sent down this case to a new trial because the question in the text had not been put to the jury.

² *Birkley v. Presgrave*, 1 East, 219; *Oppenheim v. Fry*, 3 B. & S. 873; 5 id. 348; per Blackburn, J., ante, p. 883.

³ *Orrok v. Commonwealth Ins. Co.*, cited 2 Phillips, Ins., no. 1326.

⁴ *Plummer v. Wildman*, 3 M. & Sel. 482.

⁵ *Harris v. Watson*, Peake's N. P. 72; *Frazer v. Hatton*, 2 C. B. N. S. 512; *Harris v. Carter*, 3 E. & B. 559; 23 L. J. (Q. B.) 295; *Hartley v. Ponsoby*, 7 E. & B. 872; 26 L. J. (Q. B.) 322; *MacLachlan on Shipping*, 219.

⁶ *Kemp v. Halliday*, 34 L. J. (Q. B.) 233; L. R. 1 Q. B. 520; cited, *Anderson v. Ocean S. S. Co.*, ubi supra.

⁷ *Schuster v. Fletcher*, 3 Q. B. D. 418.

benefit to the cargo, are not the subject of contribution. So, where the ship is left hopelessly stranded, but the whole of the cargo is unloaded without floating her; the ship, on principle, would seem not to be liable to contribute to the expense of unloading the cargo, nor the cargo to that of afterwards heaving off the ship.¹

Job v. Langton.

A ship under perils of the sea ran ashore in Malahide Bay, on the coast of Ireland. In order to get her off, the whole cargo was discharged, and afterwards, by a separate operation, considerable expense was incurred in floating her off, and towing her to Liverpool for repairs. The Court of Queen's Bench held, that this expense could not be deemed to be for the benefit of the cargo also, and was therefore not a general, but a particular, average on the ship alone.²

In like manner it was held that when a ship with her cargo on board had been driven ashore at Calcutta by a cyclone, and after her cargo and rigging had been unshipped, the vessel herself was dug out at an expense of 2300*l.*, this expense was not to be allowed as general average, the cargo being already in safety before it was incurred.³

Where, however, all that is done towards relieving the ship is one continuous operation, commenced, carried on, and completed for the purpose of saving both goods and ship, with a view to the prosecution of the original adventure, the goods have been held liable to contribute to all the expense, though part may have been incurred after their discharge. Yet whether the following case sustained this statement had

¹ Benecke, *Pr. of Indem.* 215, 216, 217; 2 Phillips, *Ins.*, no. 1312, 1313. Jacobson's *Sea Laws*, book iv. c. 2.

It is said, however, to be the practice in this country in case the ship is not broken up where she lies, but is got afloat again, to require her to contribute to the unloading of the cargo, as being a benefit to her; *secus*, if she is broken up on the spot; Lowndes, *Gen. Av.* 89, 90. The case seems to be within the ruling

of the Court in *Svensden v. Wallace*, per Lord Esher, 13 Q. B. D. 69.

² *Job v. Langton*, 6 E. & B. 779; 26 L. J. (Q. B.) 97. The parties in this action were the shipowner and the underwriters on ship. See *Great Indian Peninsular Ry. Co. v. Saunders*, 1 B. & S. 41; 2 Id. 266; 30 L. J. (Q. B.) 218; 31 Id. 206; *Booth v. Gair*, 33 L. J. (C. P.) 99.

³ *Walthew v. Mavrojani*, *coram* Ex. Ch., L. R. 5 Exch. 116.

long been doubted, notwithstanding the decision of the Court.

A ship, chartered out and home, from Liverpool to the Chinch Islands and back, having sailed with 800 tons of ballast, and also some goods on board for Callao, was driven aground in a gale on the East Hoyle Bank near the entrance to the port of Liverpool. As soon as the weather moderated steps were taken to get her off; the wreck, ship's materials, and goods for Callao were sent back to Liverpool in lighters; the ship was scuttled, 300 tons of ballast thrown overboard, and at last she floated. She was then taken back to Liverpool and repaired, was again fully ballasted, the goods for Callao reshipped, and she sailed again on her voyage. The Court were of opinion that, in this case, the landing of the goods was not a separate transaction, as in *Job v. Langton*, but part of the continuous operation of getting the ship off with a view to the prosecution of her original adventure; they held, accordingly, that both the chartered freight and the goods on board must contribute in general average with the ship to the whole expense of getting her off, including those incurred after the goods were landed.¹ Lord Esher, however, has in express terms said that in his opinion this case cannot be supported.²

Ransom to an enemy is now prohibited in this country by positive law;³ but this extends only to enemies, and not to

¹ *Moran v. Jones*, 7 E. & B. 523; 26 L. J. (Q. B.) 187; *Hall v. Janson*, 4 E. & B. 500; these actions were by shipowner against underwriters on freight. See also *Bevan v. The Bank of the United States*, 4 Whart. Rep. 301, cited 2 Phillips, Ins., no. 1407.

An effort was made by the Court of Exchequer Chamber in giving judgment in *Walthew v. Mavrojani*, to vindicate the decision in *Moran v. Jones* on the principles of English law, but without any marked success. It seems to me to be founded on the

principle contended for by some in England and adopted in the United States Courts and generally on the Continent, that general average looks beyond physical safety to the end of the adventure.

² *Svensden v. Wallace*, 13 Q. B. D. 80. It is to be hoped that this opinion of Lord Esher will clear the books of a decision quite irreconcilable with the principle on which it was professedly put.

³ 43 Geo. 3, c. 72, ss. 16, 17.

pirates or other plunderers; and it appears certain, that any money paid to these latter by the captain, in order to induce them to liberate the ship and the rest of the cargo, would be general average.¹ It is quite clear, also, that a compromise between neutrals and belligerents is lawful, and that the amount paid by way of carrying it out gives a claim to contribution.²

Expense of
raising
money.

All the expenses attendant upon raising money abroad for general average purposes ought, on principle, to be made good by a general average contribution, including exchange, interest, or discount on bills,³ and the maritime interest in case of bottomry.⁴ The premiums also for insuring sums thus advanced for general average purposes, are allowed when the insurance is for the protection of a stranger: but if it be the shipowner who insures (*i. e.*, his lien on the cargo) the premiums are payable by the cargo.

General
average con-
tribution.

After this enumeration of the losses for which a general average contribution is to be made, we proceed to consider upon what property such contribution is to be levied.

What contri-
butes.

All that is ultimately saved out of the adventure, consisting of ship, freight, and cargo, contributes to make good the general average loss, provided it was actually at risk at the time and under the circumstances in which the loss was incurred.

Goods landed before a jettison, do therefore not contribute:⁵ "because they were not exposed at the time of the jettison to a community of risk, and were not saved thereby."⁶ Nor, for the same reason, "do goods taken on board after the jettison."⁷

¹ Abbott on Shipping, Part iii. c. viii.

² Stevens on Average, 26. So decided in the United States; Douglas v. Moody, 9 Mass. Rep. 501; and see other cases cited in 2 Phillips, Ins., no. 1337.

³ Stevens on Average, 27; 2 Phillips, Ins., no. 1357.

⁴ Stevens on Average, 2; Benecke, Pr. of Indem. 233.

⁵ 1 Emerigon, c. xii. s. 42, p. 629.

⁶ 3 Pardessus, Droit Com. 233.

⁷ Benecke, Pr. of Indem. 306.

If, however, there be two or more successive jettisons on distinct occasions, the goods jettisoned are, for the purposes of contribution, supposed to have continued on board and to have encountered the fortunes of the common adventure, and they contribute therefore to jettisons made subsequently to that in which they were thrown overboard, provided their original destination comprehended that part of the route on which the jettisons became necessary. Such is the modern practice. But Emerigon, and after him Benecke, laid it down that goods jettisoned contributed only for the loss occasioned by that jettison, and for none occurring subsequently.¹

This implies that by the modern practice property sacrificed contributes to general average, equally as that which is saved. By the civil law, only the goods actually saved were to contribute;² but, by the Consolato del Mare, which has been followed in this respect by the uniform practice of later times, the contribution is to be levied equally upon the property saved and the property sacrificed;³ "and this," observes Boulay-Paty, "is very equitable, for if the goods jettisoned did not contribute, the owner thereof receiving their total value, would suffer no loss by the sacrifice, while the other owners would."⁴ The same reason applies to goods sold for the joint benefit of ship and cargo; and to the freight which would have been payable in respect of these goods, whether jettisoned or sold.⁵ The freight is contributed for, because the shipowner would suffer no loss by the sacrifice, unless he also contributed in respect thereof.⁶

That which
has been
sacrificed.

Freight of
goods jet-
tisoned.

All goods laden on board for the purposes of traffic contribute. By "goods" is meant, says Lord Ellenborough,

All merchan-
dize.

¹ Benecke, Pr. of Indem. 182. See also Code de Commerce, art. 425.

² Id tributum ob servatas res debent. Dig. lib. xiv. tit. 2, f. 2.

³ Consolato del Mare, c. 94 of the Italian translation, c. 51 of Pardessus, Lois Maritimes, vol. ii. pp.

101, 102.

⁴ Boulay-Paty, Comment. on Emerigon, vol. i. p. 632.

⁵ Cleirac, 88, no. 4; 2 Emerigon, Contrats à la Grosse, c. iv. s. 9, p. 475.

⁶ Stevens on Average, 61.

“all the wares or cargo for sale laden on board the ship;”¹ and Park, J., says, “The rule is that all merchandize put on board for the purposes of traffic is liable to be brought into contribution;”² or, as Magens expresses it, “what pays no freight, pays no average.”³

Wearing apparel, jewels, passengers' baggage.

It is on this last ground that wearing apparel, jewels, &c., if attached to the person do not contribute;⁴ and, on the same ground, the general practice seems to be, that passengers' baggage does not contribute,⁵ though, on principle, it does not appear why, if of sufficient value to be brought into the contributory interest, it should not do so.⁶

Jewels, &c., not about the person.

Gold, silver, jewels, precious stones, and all other small articles of value, unless carried about the person, or forming part of the wearing apparel, contribute.⁷ Mr. Phillips thinks that bank notes, being not so much property as evidence of property, ought not to contribute; Weskett, on the contrary, considers that they should; but on the general principles of law, Mr. Phillips's opinion, with which Mr. Arnould's did not coincide, seems to be the better grounded.⁸

Deck lading.

Deck lading contributes, though, as we have seen, it is not contributed for, except where there is a usage of trade so to carry,⁹ and even then, there may be a usage exempting the insurer from liability.¹⁰

Provisions.

Provisions put on board by the shipowner are covered under “ship,” and consequently contribute under the same head, or if for passengers, or for animals going to a market, then under passage money or freight; provisions put on board a chartered transport by the English Government for the

¹ Hill v. Patten, 8 East, 373.

² Brown v. Stapleton, 4 Bing. 119; Stevens on Average, 45. See, however, 2 Phillips, Ins., no. 1394.

³ 1 Magens, 63, s. 56.

⁴ 1 Emerigon, c. xii. s. 42, p. 626; 2 Valin, Ord., liv. iii. t. 8, *du Jet*, art. 11, p. 199 *et seq.*

⁵ 1 Emerigon, c. xii. s. 42, p. 626.

⁶ Pothier, des Louages Maritimes, no. 125; 2 Phillips, Ins., no. 1394.

⁷ Peters v. Milligan, 1 Park, Ins. 296.

⁸ 2 Phillips, Ins., no. 1397; Weskett, tit. *Contrib.* No. 1.

⁹ 1 Emerigon, c. xii. s. 42, p. 623; Code de Com., art. 421.

¹⁰ Miller v. Titherington, 30 L. J. (Ex.) 217.

support of convicts were held not to be liable to general average.¹ That is a doubtful decision; Mr. Phillips's opinion seems to be the better, that when put on board for passengers or animals by the shippers, and consumed on the voyage, provisions ought to contribute, but not in the case of animals going to a market;² for in the former case the value saved does not reappear; in the latter it does.

Goods belonging to government, by the old laws, did not contribute. Emerigon, however, in the case of 400 sacks of corn put on board for the garrison at Toulon, advised that the French Government must contribute to a general average.³ And it was held by Story, J., in the United States, that there was no ground, either in law or practice, for the supposed exemption of goods belonging to government when saved by the sacrifice.⁴ The practice among adjusters is to make them contribute.

Goods belonging to government.

Having thus seen in respect of what losses a contribution in general average can be claimed, and upon what property it is to be assessed, it remains to be considered how the amount to be paid in contribution is first estimated, and then apportioned on the respective interests subject thereto. This is called the adjustment of general average.

Principles of general average adjustment.

The leading principle of general average contribution, to whatever kind of loss it may be applied, is this:—That all the parties interested in the adventure, for the benefit of which the loss was incurred, should be sufferers by the loss in exact proportion to the extent of their respective interests on board at the time, but no further. This object is attained only when the party whose property has been sacrificed, or money disbursed, or credit pledged for the general benefit, is placed by the adjustment exactly in the position he would

¹ *Brown v. Stapleton*, 4 Bing. 119.

² Vol. ii. no. 1399.

³ *Emerigon*, c. xii. s. 42, p. 624.

⁴ *The United States v. Wilder*, in re Schooner *Jasper*, 3 Sumn. R. 308;

2 Phillips, Ins., no. 1345.

Practical rule
different in
case of sacri-
fice and ex-
penditure.

have stood in had the sacrifice been made, not by himself, but by some other of his co-adventurers. In the application however of this principle to practice, there is an important distinction to be observed as to the mode by which the object is sought to be obtained, in the case of losses arising from *sacrifice* and losses founded on *expenditure*.

Rule in case
of expen-
diture.

An expenditure for the general benefit is either made by the shipowner out of his own funds, or by loan from some third party. In either case he has a personal and absolute claim against all the parties interested in the adventure, in respect of this money from the moment the advance has been made. They on the other hand are bound in equity to repay this claim in full, whether any part of the property for whose benefit the outlay was made be ultimately saved or not. Were this not so, the object in every adjustment of general average would not, under all circumstances, be attained; for in those cases where the ship and goods, after being relieved by the expenditure, wholly perish before arriving at the port of destination, the party making the advance would, if no contribution were to be made, be worse off than the parties for whose benefit it was incurred, as he would not only have lost, like the rest, his share in the adventure, but remain burdened besides with a debt contracted on their account, or be the loser of a sum of money laid out for their safety.

Rule.

Hence, the long-established rule is, that disbursements for the general benefit must be fully reimbursed in general average, whether the ship and cargo be eventually saved or not.¹

Rule in case
of sacrifice.

The rule of adjustment is different where a part of the adventure itself has been sacrificed for the safety of the rest,

¹ Benecke, Pr. of Indem. 251; Stevens on Average, 20.

as in case of jettisons and other sacrifices of like nature. The principle, indeed, is still the same, that the owner of the property sacrificed must not be worse off than if his property, instead of being sacrificed, had remained on board.¹

The practical rule adopted is this :—The property sacrificed for the general benefit is regarded as though it had never been lost, but actually were a portion of the whole mass of property on which the contribution is assessed, at the time the adjustment is made ; its supposed value is assumed, and in proportion to that amount, it takes its full share with the rest of the adventure for the benefit of which it was sacrificed, in contributing to the loss thereby incurred.

Thus, to take a very simple instance, suppose property the value of which, if saved, would have been 100%, to have been sacrificed for property the value of which, as saved, is 900%. The whole sum upon which the contribution to be levied will be the aggregate value of the property sacrificed and of that saved, viz., 1000% ; the amount to be made good being 100%, or the tenth part of 1000% ; the property saved contributes a tenth, or 90%, and the property sacrificed also a tenth, or 10%, making together the whole amount lost, or 100% ; or to put it differently, the loss all over being in the proportion of ten per cent., the jettison to be made good is 90%, and the contributory value saved is 900%, one-tenth of which is 90%, the value required.

In this equitable way the owner of the property sacrificed, whilst receiving the contributions of the rest, and abating proportionately for his own share, is not better off than his co-adventurers, but exactly in the same condition in which he would have been if their property had been sacrificed instead of his.

If after the sacrifice of part, the rest of the adventure utterly perishes, the condition of all the co-adventurers is by supposition precisely equal ; all is lost in spite of the jettison, all would have been lost, had the jettison not been made ;

Where
nothing is
saved.

¹ Benecke, Pr. of Indem. 287 ; 3 Kent, Com. 242.

there is nothing, therefore, to contribute from, and nothing to contribute for.¹ Hence the rule with regard to sacrifices for the general benefit is, that they are not contributed for where nothing is saved.

Rule in case
of goods sold.

In case of goods sold to raise funds for general average purposes in a port of distress, it is a point much controverted whether this loss should be adjusted as in case of sacrifice, or as in case of expenditure,—whether, that is, if the whole adventure subsequently perish, the owner of the goods sold is or is not entitled to contribution. There has been no express² decision on this subject, either in our own Courts or those of the United States, and the foreign authorities are exceedingly conflicting.

It might be expected, however, when the funds are applied to the relief of a particular interest, that there should be but one opinion, that such interest was liable at least for the amount raised as for a debt, whatever might be the ultimate fate of the adventure.

The 68th Article of the Laws of Wisbuy directs, “That if the captain in parts beyond the seas be obliged to sell goods for the repairs of the ship, and the ship thereafter perish, he shall repay the merchant freighter for his goods so sold, at their value at the port of loading, and shall receive no freight therefor.”³

Valin, upon the authority of this article, states the law in the same way, and argues, that as the goods were sold to defray a personal debt of the shipowner, there is no reason

¹ 1 Emerigon, c. xii. s. 41, p. 603.

² Incidentally, the point was decided in this country in *Powell v. Gudgeon*, 5 M. & Sel. 431, where a shipowner, who had sold goods for the necessary repairs of the ship, was held responsible to their owner, although after the repairs the ship and cargo had been totally lost by capture.

³ The genuineness of this article

appears doubtful (Benecke, *Pr. of Indem.* 266); it does not occur in the first printed edition of these laws, published in 1585, nor in the two earliest MSS. of 1533 and 1537 (Pardessus, *Lois Maritimes*, vol. i. p. 523). Even if genuine, it applies in terms only to the case in which the goods are sold for the necessities of the ship, and could not therefore give a claim to contribution.

why he should not pay their value to the owner of the goods whatever may be the issue of the voyage, just as if he had raised the money by drawing a bill.¹ Pothier considers that in theory Valin is right, though he acknowledges the practice to be against him.² By the modern French code it is provided generally, that the shipowner shall reimburse the owner of the goods sold, whether any part of the adventure be finally saved or not;³ and this for the reason given in the French Council of State (when the article just cited was under discussion there), "that the master and owners of the ship, whose duty it was to supply the necessities of the ship, had contracted an individual debt, by applying those goods to the accomplishment of their personal duty."⁴

Emerigon, after a learned citation of authorities,⁵ is of opinion that, as in the case of jettison, the goods sold are to be considered as still continuing on board, and, therefore, that, if the whole adventure subsequently perish, no contribution is due.⁶ To the weight of this authority we have to add the opinion of Lord Tenterden,⁷ Mr. Stevens,⁸ Mr. Benecke,⁹ and Chancellor Kent.¹⁰

By the law of England it is determined that the owner of goods sold for the relief of a particular interest is entitled to be paid by that interest the sum actually produced by the sale, although the adventure is not ultimately brought to land; and if it be brought to land, he is entitled to receive either what the goods produced at the place of sale, or what they would have produced in their intended market, whichever is the greater in amount.¹¹

¹ 1 Valin, 655, 656.

² Pothier, *Des Louages Maritimes*, nos. 43, 72.

³ Co. de Com. art. 298.

⁴ Boulay-Paty, *Droit Com.* 420.

⁵ Consolato del Mare, 105; Jugemens d'Oleron, art. 22; and the Regulation of Antwerp, art. 19.

⁶ 2 Emerigon, 474-476, who calls it *pret forcé à grosse aventure*, a loan

upon the success of the adventure.

⁷ Abbott, *Ship*, 257; 10th ed. 279.

⁸ Stevens on Average, 15.

⁹ Benecke, *Pr. of Indem.* 192.

¹⁰ 3 Kent, *Com.* 212, 213.

¹¹ Atkinson *v.* Stephens, 7 Exch. 567, 575; Hallett *v.* Wigram, 19 L. J. (C. P.) 281; Richardson *v.* Nourse, 3 B. & Ald. 237; per Curiam, Hopper *v.* Burness, 1 C. P. Div. 137.

Rule where
ship perishes,
but goods are
saved.

Another question on which there has been great diversity in the positive regulations of foreign States and the opinions of jurists is, where the ship perishes by the agency of the very peril to avert which the sacrifice was made, but the cargo, or part of it, is saved from the wreck,—does that which was saved contribute for that which was sacrificed?

On the one hand, the civil law expressly decrees that in such case no contribution shall be made, but that the merchants shall save all they can on their own account *tantum ex incendio*.¹ The French law, following the civil law, provides in the Code de Commerce, “That if the jettison does not save the ship, no contribution takes place.”²

The French jurists, following the Ordinance and the Code, are unanimous in maintaining, that where the jettison and the wreck are caused by the same storm, the goods saved from the wreck shall not contribute for those jettisoned just before it took place.³ Valin even goes farther, and says, “That whenever the ship is wrecked during the continuance of the same storm that gave occasion for the jettison, even though it may not be till some days afterwards, yet the goods saved do not contribute for those jettisoned.”⁴

Mr. Marshall⁵ and Mr. Stevens⁶ both agree that the ship must be saved at the time, and if not, that no contribution is due, though part of the cargo may be saved. Lastly, Mr. Chancellor Kent, in his Commentaries, states the law in the same way and cites two American authorities in which the point has been expressly decided.⁷

On the other hand, the maritime law of Spain provides, that in such case the goods saved shall contribute for those

¹ Dig. lib. xiv. tit. 2, f. 7; 1 Pardessus, Lois Mar. 108.

² Art. 423; Ord. de la Marine, liv. iii. t. 8, *du Jet*, art. 15; the Hamburg Ordin. tit. *Von Werfung*, art. 9, is to the same effect.

³ Pothier, Louages Mar., no. 114;

1 Emerigon, c. xii. s. 41, p. 602; Boulay-Paty, Comment. *ibid.* 603.

⁴ 2 Valin, tit. *du Jet*, art. 15, 16, 205–207.

⁵ 2 Marshall, Ins. 541.

⁶ Stevens on Average, 8.

⁷ 3 Kent, Com. 234, 235.

sacrificed.¹ Weijsen, an early and highly esteemed writer upon Average, lays down the law in the same way, and states the reason for it to be, that if the goods jettisoned had not been so sacrificed, their owners might have saved or recovered them, all or in part, as the other owners have.²

Mr. Benecke, who with his usual erudition has examined all the authorities on the subject,³ and Mr. Phillips, who cites a remarkable decision in the United States in support of his views,⁴ both adopt the reasonings of Weijsen and the rule of the Spanish law.

In our Courts there has been no decision on the subject; and in the absence of binding authority the question would have to be determined on principle alone. Modern practice with adjusters in this country is to disregard the inquiry as to the success of a jettison, and to adjust it on the footing of general average, provided the conditions of general average be satisfied by the circumstances of the case.

But whatever diversity of opinion may exist with regard to the point just discussed, there is no doubt whatever about this position,—that if the ship survives the peril, to avert which the sacrifice was made, and is ultimately wrecked in the after part of the voyage, all that is saved from the wreck must contribute to make good that which was previously sacrificed;⁵ for without such previous sacrifice, it is assumed that nothing would have been saved at all.⁶

Where the ship is saved at the time, but ultimately perishes.

¹ Ordinanzas di Bilbao, c. xx. art. 16.

² Des Avaries, art. 33.

³ ⁴ Benecke, *System des Assecuranzen*, pp. 18-23, and also *Pr. of Indem.* 178-181.

⁴ 2 Phillips, *Ins.*, no. 1318. The case referred to is that of *Caze v. Reilly*, 3 Wash. C. C. R. 298; and see also *Walker v. United States Ins. Co.*, 11 Serg. & Rawle, 61, in which contribution was allowed for masts, sails, and anchors sacrificed for the common safety, though the ship was totally lost by the very perils they

were sacrificed to avert.

⁵ See in Benecke all the foreign ordinances, *System des Assecuranzen*, vol. iv. p. 23; Nolte's ed., vol. ii. p. 692. See, for the United States, 2 Phillips, no. 1318; 3 Kent, *Com.* 239.

⁶ 1 Emerigon, c. xii. s. 41, p. 602. Boulay-Paty says that, in order to apply the rule, the storm which occasioned the jettison must have been entirely at an end, and the ship have proceeded on her voyage again in the ordinary course:—*Comment. on Emerigon*, *ibid.* 604.

Whether ultimate or immediate success.

A question already glanced at has divided in opinion those who are very conversant with the practice of average adjustment, and that is, whether the object of an average sacrifice be immediate safety only, or the ultimate success of the voyage.

In this country the former is the rule of practice, and of law,¹ the other but a speculative view. On the Continent, however, and in the United States, where there is a disposition to be much more lavish in compensating evils at the joint expense, this latter view, unconsciously perhaps, modifies legislation there to a considerable degree, until it deviates widely from the line of principle followed in this country.

The daring spirit of individual enterprise in England has never needed the encouragement of factitious aid and compensatory protection; but the timid spirit hitherto prevalent over much of the Continent in maritime affairs has appealed so successfully to the practice of general average adjustment, that assimilation to their system in our practice and law were a thing, though desired by some, to be generally deprecated.²

Mode of estimating loss for a general average adjustment.

The first step towards a general average adjustment is, to ascertain the value at which the property sacrificed, and the loss incurred, ought to be estimated, for the purposes of the contribution.

Loss from jettison.

As a general rule, goods jettisoned ought to be contributed for on the value at which they would have contributed. In most cases, that is the net value they would have sold for at their port of destination, deducting freight, duty, and landing charges;³ unless the jettison be so near the outset of the

¹ *Attwood v. Sellar*, 4 Q. B. D. 342; 5 Q. B. D. 286, C. A.; *Svensden v. Wallace*, 13 Q. B. D. 69; *Walthew v. Mavrojani*, L. R. 5 Exch. 116; *Job v. Langton*, 26 L. J. (Q. B.) 97.

² This has been in agitation for some time. England has everything

to lose, nothing to gain, by an assimilation, which at best will be imperfect, and even then at a sacrifice of nearly all those principles now recognised.

³ *Benecke*, Pr. of Indem. 288; 2 *Phillips, Ins.*, no. 1371.

voyage, that the adjustment is made in the port of departure; in that case, their cost price is naturally assumed to be their value, in the absence of evidence to the contrary, including shipping charges but not premiums of insurance.¹ But if the ship does not reach the port of destination, and the adjustment is settled at an intermediate port, the loss is the net value of the goods there.²

If, after jettison of part, the rest of the cargo arrives in a damaged estate, owing to causes which would equally have affected the goods jettisoned had they remained on board, the amount at which the goods jettisoned should be contributed for, is the net sum they would have realised in a damaged state.³

Where the cargo arrives damaged.

The amount of damage done to ship or goods in and by the act of jettison is to be estimated, for the purposes of adjustment, by deducting their net proceeds, as damaged, from what would have been their net proceeds, if sound.⁴ If the goods jettisoned were subject to leakage or breakage, the ordinary leakage and breakage ought, it seems, to be deducted in estimating the value at which they are to be contributed for.⁵

Damage occasioned by jettison.

Where goods which have been jettisoned are recovered before the adjustment takes place, the amount at which they

Where goods jettisoned have been recovered.

¹ Benecke, Pr. of Indem. 289; Stevens, 47. So held in the United States; *Tudor v. Macomber*, 4 Pickering's Rep. 34; 2 Phillips, Ins., no. 1365. This was the case of a cargo of ice shipped at Boston, bound for Charleston, jettisoned near Cape Cod. The ice would have fetched a high price at Charleston, and was utterly valueless in the port of distress (Chatham, near Cape Cod). At Boston its value was, the cost of cutting, storing, and shipping; this was taken as the contributory value.

² Benecke, Pr. of Indem. 289.

³ Benecke, Pr. of Indem. 293. Mr. Phillips dissents from this rule on the ground of the practical difficulty of

its application (vol. ii. no. 1367). It seems, however, entirely in accordance with the principle established by the early maritime codes, viz., that the goods jettisoned should be paid for after the rate at which the other goods on board at the time would have sold on their arrival in port.

The rule was adopted by the Court of Common Pleas in the case of the *Savoir Faire*—*Fletcher v. Alexander*, L. R. 3 C. P. 375, 384. And yet I am told by some adjusters that their practice before and since that case is to adjust a loss by jettison of goods in a sound state at the sound value.

⁴ Benecke, Pr. of Indem. 292.

⁵ 2 Phillips, Ins., no. 1366.

ought to be contributed for is the amount of the damage done to them by the jettison, and the expense of recovering them.¹ And if recovered after adjustment, the amount paid for them in contribution, in excess of these two items together, is to be refunded.²

Jewels, &c.,
packed as
articles of
inferior value.

Upon the assumption I suppose of intentional fraud, it is said that jewels, or other valuables, described in the bill of lading as of inferior value, are to be contributed for on that footing;³ or if inclosed in a box without intimation of their value, and this box be thrown overboard, it is decreed in the Laws of Wisbuy, with the approbation of foreign jurists, that their value shall be the value of the box only, or of such goods as the master might reasonably suppose it to contain.⁴

Freight lost.

The amount payable in contribution for the freight lost with the goods jettisoned is the gross freight they would have paid on arrival with the ship.⁵

Sacrifice of
part of ship.

Damage purposely inflicted on the ship for the general benefit is to be estimated at the cost of the repairs, deducting one third if the ship be of wood; in the absence of repairs done, the damage is a subject for estimation. For the whole ship, as in case of her total loss by voluntary stranding, with a saving of cargo, the measure of the loss is held in the United States to be the value of the ship to her owner at the time she ran aground, as if she were at that time in safety.⁶ Her freight in that case was taken to be its gross amount at the port of destination.⁷

¹ Boulay-Paty, Comment. on 1 Emerigon, c. xii. s. 40, p. 597; Code de Commerce, art. 429.

² Ibid.

³ Benecke, Pr. of Indem. 294.

⁴ Laws of Wisbuy, art. 43; Weijtsen, s. 33; Casaregis, Disc. 46, no. 49; and see 2 Phillips, Ins., no. 1372. See Lebeau v. Gen. Steam Navig. Co., L. R. 8 C. P. 88.

⁵ Stevens on Average, 20, 2 Phillips, Ins., no. 1368.

This rule would seem to apply also to the case of insured freight where the ship is totally disabled at a subsequent intermediate port, and the remaining goods are sent on by another ship at the cost of the insurer; Kidston v. Empire Ins. Co., L. R. 1 C. P. 535; 2 id. 357.

⁶ 2 Phillips on Ins., no. 1369.

⁷ Columbian Ins. Co. v. Ashby, ibid.

Goods sold for the general benefit are to be paid for in Goods sold. contribution, if the adventure reaches its destination, either at the net value they would have fetched at the port of discharge, or at the sum they actually brought at the intermediate port, deducting freight, duty, and landing expenses.¹ If the adventure does not reach its destination, the amount of contribution is the price obtained for the goods at the port of distress, less freight *pro rata*, duty, and landing expenses. The shipowner in the former case would seem to be entitled to full freight, and in the latter to freight *pro rata* to the port of sale.²

When money is raised abroad by bills or otherwise, for the Loss by sake of defraying expenses of the nature of general average, raising money the amount actually expended is the amount to be contributed on credit. for, including interest, maritime and ordinary, and loss by discount on bills and by the rate of exchange.³

Having thus seen the mode in which the property sacrificed Contributory value of the property saved. is to be valued for the purposes of general average adjustment, let us now see what valuation is put, for the same purposes, upon the property saved; in other words, let us inquire what is its contributory value.

The general principle of valuation is simply this:—"that General principle. the value of the property to its owners, as saved by the sacrifice or the expenditure, is the value upon the footing of which it ought to contribute towards making good the loss;" or, as the rule is frequently given, "the contributory value of the different interests is their value to their owner at the time and place to which the apportionment relates."

In the application of this principle much difficulty has In case of expenditure.

¹ 2 Phillips on Ins., no. 1363. See *Depau v. Ocean Ins. Co.*, 5 Cowen, 63; *Richardson v. Nourse*, 3 B. & Ald. 237; *Atkinson v. Stephens*, 7 Exch. 567; *MacLachlan on Shipping*, 439; and 2 Phillips on Ins., no. 1364. Mr. Benecke dissents from this view

(see *Pr. Indem.* 274); but it seems well justified.

² Per Alderson, B., *Atkinson v. Stephens*, 7 Exch. 567.

³ Benecke, *Pr. of Indem.* 250; 2 Phillips, Ins., nos. 1359, 1360.

arisen from not discriminating between the mode of adjustment in the case of sacrifice, and that pursued in the case of expenditure. In the case of expenditure, contribution is due from the moment of outlay, and payable in any event. In these cases, therefore, the time and place to which the apportionment relates is the time and place of the disbursement, and the contributory value of the property saved is the sum it was worth to its owner at the time and place at which the expenditure was incurred, without reference to any subsequent deterioration which may have taken place before its arrival in port.¹

In case of
sacrifice.

It is different in the case of sacrifice. In that case the property at risk when the sacrifice was made is not considered as saved, for the purpose of contribution, until its arrival at the place of adjustment. That place should, whenever practicable, be the port of discharge, and the time that of the ship's arrival there.² Hence the rule, that in case of losses arising from sacrifice, the contributory value of the different interests saved thereby is their net value in the state in which they actually come into their owners' hands at the port of destination.³

Practical rule
followed.

Accordingly, where the loss to be adjusted has arisen partly from sacrifice and partly from expenditure, the contributory value of the property saved ought, in theory, to be estimated on two different principles. Mr. Phillips considers, indeed, that this is the true rule to be followed in practice.⁴ Mr. Arnould says that rule does not appear to be adopted in this country, and, in fact, would be attended with a degree of difficulty and embarrassment inconsistent with the exigencies of actual business.

¹ Benecke, Pr. of Indem. 298. So in the United States it has been decided, that in such cases the contribution must be adjusted according to the value saved at the time when the expense was incurred; *Douglas v. Moody*, 9 Mass. Rep. 518; *Spafford v. Dodge*, 14 Mass. Rep. 79; 2 Phil-

lips, Ins., nos. 1374, 1377.

² This excludes the rise or fall of the market or the effects of deterioration, such as might occur in case of delay.

³ Stevens on Average, 49.

⁴ 2 Phillips, Ins., no. 1377.

Perhaps Mr. Arnould refers in these terms to one and the same loss, and that of a mixed character. But suppose there be successive losses, one of expenditure followed by a particular average. For instance, a ship bound from Calcutta to London necessarily cuts away her masts to righten; she is found by a steamer in this condition, and is towed into Mauritius; she is there repaired, and a claim for salvage is awarded and settled at 25 per cent. on the value of ship, freight, and cargo. Having proceeded on her voyage she is subsequently wrecked on the coast of France, and only one fourth part of the cargo is saved; is the prior salvage to be apportioned on this miserable residue? Mr. Benecke thinks, and as it seems with reason, that it could not be correct practice to adjust the 25 per cent. on the remainder which is ultimately saved of the adventure;¹ but that it ought to be adjusted on the various interests as they were at the time when they were in the port of Mauritius.

In what follows, unless otherwise expressed, the loss to be made good by the contribution is assumed to be loss arising from sacrifice. In case of sacrifice.

The ship, agreeably to these principles, is to be estimated for the purposes of contribution solely with reference to her value as finally saved by the sacrifice,—in fact, her worth to the owners at the time and place of adjustment.² In those cases of peculiar vessels for which there may be said to be no market, because they are designed originally for a particular trade, this general principle seems to hold good also, provided they were engaged in that trade at the time of the general average loss;³ but in case they were not then engaged in such trade, and were not retained by the owners with a view to it, since they must be esteemed *ordinary* in point of employment and purpose, although *peculiar* in design, it is As applied to ship.

¹ Benecke, Pr. 300.

² Stevens, 63; Benecke, Pr. of Indem. 311; 2 Phillips, Ins., no. 1379. See as to this, Baily on General Average, 141-144.

³ I infer this from the principle accepted in *Grainger v. Martin*, 31 L. J. (Q. B.) 186; in error, 4 B. & S. 9.

probable that a much lower value would be put upon them by the law.¹

Difficulty of fixing a practical rule.

To lay down a general rule, however, for particularly determining the value of ships in each instance, is so difficult that a value has been very generally, but very variously, fixed by the positive laws of almost all mercantile states.²

Rule given by Mr. Stevens.

In this country we have no fixed rule. That which is suggested by Mr. Stevens deserves the attention due to his authority; but it seems, after all, to leave the principal difficulty unsolved. His rule is this:—Deduct from the original value of the ship when she sailed: 1. The provisions and stores expended; 2. The wear and tear of the voyage; 3. Any partial loss sustained up to the time when the general average loss took place.³

There can be no demur to the first or to the second⁴ of these deductions. With regard to the third, there seems to be no reason for confining it to damage incurred before the general average loss, as the only value to be attended to is her worth when she actually comes to port, and consequently after deducting all losses sustained up to that time.⁵

¹ I may refer to the considerations appearing in the case of the *African Steam Ship Co. v. Swanzy*, 2 K. & J. 660; 25 L. J. (Ch.) 870.

² Mr. Benecke, with his usual industry, has collected the different regulations on this point, *Pr. of Indem.* 223–325; for the later ordinances see Nolte's *Benecke*, vol. ii. pp. 704–708. The rule of the French law is to deduct one-half, *Code de Com.*, art. 304, 491. In one case in the United States, after capture and detention of the ship, one-fifth was deducted from her original value, in order to estimate her contributory value; *Leavenworth v. Delafield*, 1 Caines, 574; and this deduction of one-fifth appears to be followed as a rule in some of the States: Mr. Phillips, however, disapproves of it; vol. ii. no. 1379.

³ Stevens on Average, 53.

⁴ Car le jet n'a pas sauvé un navire neuf, mais un navire plus ou moins dégradé par la navigation:—3 Pardessus, *Droit Com.* 241.

⁵ Benecke, *Pr. of Indem.* 311; Lowndes, *Gen. Av.* 228. Mr. Phillips thinks that deductions ought also to be made in respect of all subsequent general average losses, on the ground, that the sum paid by the ship in respect of them is so much lost to the shipowner; and, therefore, not finally saved to him by the sacrifice, vol. ii. no. 1381. Where a ship after jettison was wrecked, but the materials saved, these were held to be bound to contribute upon their value as saved, after deducting the expenses of salvage; *Dodge v. Union Ins. Co.* 17; *Pickering R.* 453; and see Baily on General Average, pp. 142, 143. These views of Mr. Phillips

If the general average loss be of some part of the ship herself, as a mast, cable, &c., the sum paid to the ship by way of contribution for this loss must be added to such worth in port, in order to make up her true value for the purposes of adjustment.¹

The principle upon which freight is to contribute in the case of general average is, that it was one of the things at hazard at the time when that sacrifice was made which produced the general average loss;² and the principle upon which its contributory value is assessed is the same as in the case of the ship; viz., that the amount to contribute is the amount eventually saved by the sacrifice. The rule, therefore, is,—1. That freight, in order to be contributory at all, must have been pending at the time of the sacrifice: 2. That the true contributory value of freight is the actual sum finally received as freight by the shipowner, after deducting the expenses of earning it incurred subsequently to the general average, exclusive of provisions.³

As applied to freight.

Under the first principle it is held in the United States, that if the cargo, or a part of it, have been delivered before the sacrifice took place, the freight due in respect thereof does not contribute.⁴ Freight paid in advance, not to be recovered back by the shipper in any case, does not contribute in the hands of the shipowner to whom it was paid; but, in the hands of the shipper by whom it was paid, it does contribute,⁵ either directly as freight, or indirectly in the enhanced value of his goods at risk. If only freight *pro rata itineris* is earned, that alone contributes.⁶ On the same

Freight pending at the time of the sacrifice.

and Mr. Bailly seem to be based on the theory of final as opposed to immediate physical safety.

¹ Stevens on Average, 54; 2 Phillips on Ins., no. 1380.

² Per Lord Ellenborough in *Cox v. May*, 4 M. & Sel. 159.

³ Stevens, 63; 2 Phillips, Ins., no. 1385.

⁴ *Dunham v. Commercial Ins. Co.*, 11 Johns. 315; *Strong v. New York Firemen's Ins. Co.*, *ibid.* 323, cited 2 Phillips, Ins., no. 1385.

⁵ *Trayes v. Worms*, 34 L. J. (C. P.) 274.

⁶ *Maggrath v. Church*, 1 Caines, 196.

principle, where a ship was chartered at so much a month to sail on successive passages, and the general average loss happened in the course of the last passage, it was held in the United States that the freight on which contribution was to be assessed, was such a portion of the freight as would have been earned on that passage according to the customary or prevailing rate.¹

If a vessel be chartered for a voyage out and home at one entire sum which is contingent on her arrival in safety at the home port, the whole sum being at risk contributes to general average at any part of the voyage.² Where the freight is apportioned in the charter-party between the outward and homeward parts of the voyage, I should think, by analogy to the law affecting seamen's wages when they depended on the earning of freight, that not the whole but only a portion would be respectively liable according as the average loss happened on the outward or homeward passage. *A fortiori* it would be so if they were separate voyages, whether under the same charter-party or not. Indeed, this principle has been carried much farther in the United States by the case already cited.³

¹ *Spafford v. Dodge*, 14 Pick. Rep. 66; 2 Phillips, Ins., no. 1387. So, *Benecke*, 315.

² *Williams v. London Ass. Co.*, 1 M. & Sel. 318.

³ Mr. Baily (pp. 150-153) seems to favour a much more extensive view of the freight that would be liable to contribute than is indicated in the text, and it is likely that this opinion would not be modified by the decision in *Barber v. Fleming*, L. R. 5 Q. B. 59.

But, first, I submit that this question is not coextensive with the question of insurable interest. It is not the same kind of question. Secondly, it is the actuality of value, pre-eminently so, that general average is concerned with; and not the potentiality of gain not then being

earned; in other words, what freight the ship has got on board, and not what she may put on board (even under existing contract) if she survive the peril, or, whether cargo be or be not on board, what chartered hire is being earned by the ship's sailing on the chartered voyage. Mr. Lowndes seems to take the question as being identical with insurable interest, and goes the whole length of the decision in *Barber v. Fleming*, and this although Willes, J., gave it as his opinion in *Potter v. Rankin*, L. R. 3 C. P. 562, that the homeward freight in that case would not be subject to contribution for general average on the outward voyage: *Lowndes, Gen. Av.* 240.

From the second principle it follows that in order to ascertain the amount at which freight ought to contribute, the wages of the master and crew ought to be deducted from the gross amount of the freight, for they are part of the necessary expenses of earning it, and must, in any case, be paid out of it;¹ but such wages only as are due up to the termination of the voyage, from the time when the sacrifice was made.² I believe it is the practice to take no account of provisions in this estimate.

Only the net freight contributes.

Moreover, the shipowner is not at all liable in respect of freight if it be entirely consumed by wages, for instance, through unavoidable detention at sea by weather, or in port under embargo.³ And if his own ship is disabled, and the cargo is sent on in another's, he is liable only for the excess of freight received, over that paid to the substituted ship. Hence, if he is obliged to pay the same or a higher freight for the hire of the second ship than he was to receive for the use of the first, he is not liable although the loss occurred before the transshipment.⁴ The practical rule therefore in the absence of transshipment is, that freight contributes to general average upon its net value, after deducting the wages of the master and crew.

Like ship and freight, goods contribute upon the value finally saved of what was at risk at the time of the sacrifice; in other words, the value of the goods, as they arrive at the place and time of adjustment.⁵ That place, if possible, is the port of discharge, and the time of making it is as speedily as possible after the ship's arrival there; and hence the general practical rule is:—That goods contribute on their actual net value, *i.e.*, on their market price at the port of adjustment, less freight, duty, and landing expenses.⁶

As applied to goods.

¹ Stevens on Average, 63; 2 Phillips, Ins. no. 1389. So, per Curiam, in Spafford v. Dodge, 14 Pick. R. 66.

² Stevens on Average, 59.

³ Ibid. 60.

⁴ So decided in America; Searle v.

Scovell, 4 Johns. Ch. R. 218; 2 Phillips, Ins. no. 1388.

⁵ Benecke, Pr. of Indem. 298; Stevens on Average, 49.

⁶ Stevens on Average, 48; Benecke, Pr. of Indem. 301; 2 Phillips, Ins. no. 1391.

At port of
loading.

In case of a general average loss at the outset of the voyage, and the ship in consequence putting back into the port of loading, the adjustment should be settled there: and the contributory value of the goods would be "their cost on board without insurance," *i.e.*, the amount of tradesmen's bills and shipping charges, "such being the value at risk."¹

Combined
value of goods
lost and goods
saved.

If the sacrifice to be contributed for consists of a jettison or sale of goods for the general benefit, then, on the principle already illustrated in the case of ship and freight, the estimated net value of the goods jettisoned or sold must be added to the net value of the goods saved, and the whole will be the contributory value of the goods.²

Damaged
goods at their
damaged
value.

If the goods saved have, after the sacrifice, been deteriorated or damaged by perils of the sea, they must, of course be taken at their deteriorated value as finally saved;³ if, however, they have been damaged by the very sacrifice for which contribution is claimed, then they must be taken at their value as sound, for this damage is made good to them in contribution.⁴

Successive
values.

"It may happen," says Benecke, "that the same goods will have to contribute in different proportions to several distinct claims of general average. Suppose, for instance, a vessel to be retaken and salvage paid for the cargo, which at that time was sound, and a new general average to take place on the continuation of the voyage and the cargo was damaged, then the cargo will have to contribute towards the first general average, according to its full value, and to the second according to its diminished value at the time of its arrival."⁵

Freight paid
in advance.

When the shipper pays freight in advance at the outset of

¹ Fletcher v. Alexander, L. R. 3 C. P. 375; Stevens on Average, 47.

² Stevens, 48.

³ Fletcher v. Alexander, L. R. 3 C. P. 375; Benecke, Pr. of Indem. 298.

⁴ Stevens on Average, 48.

⁵ Benecke, Pr. of Indem. 800.

Many of the adjusters dispute this, and their practice is not in accordance with it.

the voyage, such advance contributes in his hand either as freight or as an addition to the contributory value of his goods, because the loss of such freight to the shipper was prevented by the sacrifice.¹

Mr. Phillips² objects to imposing this contribution for freight paid in advance on the shipper, because "freight is not usually advanced upon the understanding that the shipper thereby takes any additional responsibility in respect to contributions in general average," and Mr. Arnould agrees with him; but it is now decided otherwise in this country, for reasons which appear to be much more cogent.³

By way of illustrating what has preceded, the following example, in figures, of a general average adjustment, settled after the ship's arrival at her port of destination, is taken, with a few alterations, from Abbott on Shipping:—

VALUATION OF LOSSES.		VALUE OF ARTICLES TO CONTRIBUTE. In England.	
Goods of A. jettisoned - -	£500	Goods of A. jettisoned - -	£500
Damage done to goods of B. by the jettison - - -	250	Net value of the goods of B., deducting freight and charges - - -	2,000
Freight of A.'s goods jettisoned	100	Ditto of the goods of C. -	500
Price of a new cable, anchor, and mast - - -	£280	Ditto ditto D. -	2,000
Deduct for new materials	80	Ditto ditto E. -	5,000
	200	Value of the ship, deducting wear and tear, amount of particular average loss, stores, and provisions -	2,000
Expense of bringing the ship off the sands - - -	50	Clear freight, deducting wages	800
Pilotage and expenses inward and outward at the port where the ship put in to refit - - -	150		
Expenses there ⁴ - - -	25		
Adjusting this average -	4		
Postage - - -	1		
Total amount of losses to be contributed for - -	£1,280	Total of contributory value	£12,800

¹ *Trayes v. Worms*, 34 L. J. (C. P.) 274; *Benecke, Pr. of Indem.* 314.

² *Phillips, Ins.*, no. 1404.

³ See *Trayes v. Worms*, *supra*.

⁴ It is assumed that the ship makes for a port of distress owing

to a general average loss, but that the cargo is not unloaded, otherwise the expense of unloading, warehousing, and reloading must have been added, *Attwood v. Sellar*, 4 Q. B. D. 342; 5 Q. B. D. 286, C. A.

Then, as 12,800*l.* : 1,280*l.* : 100*l.* : 10*l.*; therefore each person will lose 10 per cent. on the value of his interest in ship, freight, and cargo. Thus, A. loses 50*l.*, B. 200*l.*, C. 50*l.*, D. 200*l.*, E. 500*l.*, the shipowners 280*l.* The shipowners, therefore, are to pay towards the contribution 280*l.*; but they are to be paid 530*l.* (*i. e.* freight, 100*l.*; mast, cable, and anchors sacrificed, 200*l.*; disbursements, 230*l.*). On the whole, therefore,

The shipowners are actually to receive	-	-	-	£250
A. contributes 50 <i>l.</i> , but is to be paid 500 <i>l.</i> —actually receives	-	-	-	450
B. contributes 200 <i>l.</i> , but is to be paid 250 <i>l.</i> —actually receives	-	-	-	50
Total to be actually received				£750
<hr/>				
On the other hand, C., D., and E. have lost nothing, and are to pay as before, viz. :	}	C.	-	£50
		D.	-	200
		E.	-	500
Total to be actually paid				£750

This amount is exactly equal to the total to be actually received, and must be paid to each person entitled to contribution in rateable proportion.

In foreign countries.

As a general rule, the place for the adjustment of general average is the ship's port of destination or discharge: when this happens to be a foreign port, the general average loss is adjusted there, according to the law and usage of the country to which such foreign port belongs; and the adjustment so made is called a foreign adjustment.¹ If the adventure be broken up at an intermediate port, the ship and the cargo entirely quitting company with each other, either of necessity or by consent of the parties, that port becomes in effect the port of discharge, and the place therefore for adjusting the

¹ *Simmonds v. White*, 2 B. & Cr. 805.

general average. But in the absence of proof of the termination of the voyage by necessity or consent at an intermediate port, any adjustment there not made with the express consent of all parties concerned in it will not be binding on them.¹

There is a great diversity in the practice of different countries with regard to what shall or shall not be included in general average; sometimes losses are included and charged for, which are general average in the country where the adjustment is settled, but not in the country where the charter-party was entered into and the policy of insurance effected: and sometimes a different proportion of contribution is assessed in the foreign port from that which is chargeable in the home port.² In either case two questions arise:—First, are the co-adventurers as among themselves bound by the foreign adjustment? Secondly, are the respective underwriters bound by it?

With regard to the first, jurists are agreed that the parties are liable to make contribution in accordance with the laws of the place of adjustment.³ Thus on an adjustment settled at St. Petersburg, the owners of cargo (British subjects) had been compelled, by detention of their goods, to pay a contribution assessed on them for the expense of repairs, which were general average in Russia, but not in this country; and it was held that they could not recover it back from the shipowner, though he was himself a British subject.⁴ A similar decision was given in respect of a contribution for

The parties to the adventure are bound by a foreign adjustment. *Simmonds v. White.*

¹ See the very extreme case upon the facts in *Hill v. Wilson*, 4 C. P. D. 329.

² A view of the principles of general average and of adjustment followed abroad would require a volume, and still be imperfect and at best serve no practical purpose. In each country, as in our own, every port differs more or less from another in the rules and principles which it fol-

lows in this matter. Lowndes, in his able work on General Average, as a means towards the information here referred to, includes a number of foreign codes on the subject in an Appendix.

³ Per Story, J., *Peters v. Warren Ins. Co.*, 14 Peters, S. C. 99; 2 Phillips, Ins. no. 1413.

⁴ *Simmonds v. White*, 2 B. & Cr. 805.

Dagleish v.
Davidson.

wages and provisions, the adjustment in this case also being Russian.¹ The reason given for it by Lord Tenterden is this, that "The shipper of goods tacitly, if not expressly, assents to general average, as a known maritime usage, and by assenting to it he must be also taken to assent to its adjustment at the usual and proper place, according to the usage and law of the place."²

The law in this respect is the same in the United States.³

The under-
writer is
bound by a
foreign ad-
justment
made, accord-
ing to foreign
usage.⁴

With regard to the second question, namely, whether the underwriter, in this country, is bound by a foreign adjustment, there is not the same unanimity; but still, upon general reasonings and from the tenor of the few judicial decisions upon it in this country, the true rule appears to be this:—1. That the underwriter is in all cases bound by a foreign adjustment of general average, when it is rightly settled according to the laws and usages of the foreign port; 2. But that, unless it is clearly proved to have been settled in strict conformity with such laws and usages, he is not bound thereby in any case in which he would not be bound in this country.⁵

Newman v
Cazalet.

Thus, the assured (owner of goods) had been compelled to pay, under a foreign adjustment settled at Pisa, in respect of losses, which would not have been general average in this country, and upon contributory values differently computed from what they would have been here; yet as it clearly appeared in evidence that all the losses allowed were general average at Pisa, and that the apportionment was correct according to the mercantile usage of that place, the assured was allowed to recover against his underwriter the full amount of his claim.⁶

¹ Dagleish v. Davidson, 5 Dowl. & Ryl. 6.

² 2 B. & Cr. 810.

³ 3 Kent's Com. 243; 2 Phillips, no. 1413.

⁴ Frequently there is a clause introduced into the policy to this effect:—"General Average payable

according to foreign statement, if so adjusted." But in the absence of this the law is as appears in the text.

⁵ Dent v. Smith, L. R. 4 Q. B. 414; Stevens on Average, 71, 72; Phillips, vol. ii. no. 1414.

⁶ Newman v. Cazalet, 2 Park, Ins. 900.

So, the holder of a respondentia bond (on a Danish ship), *Walpole v. Ewer*, not liable to general average at all in this country, was compelled to pay a contribution under a foreign adjustment, settled in Denmark, and upon evidence given that it was in accordance with the law and practice in Denmark, he recovered against the underwriters.¹

On the other hand, where the owner of goods insured from London to Lisbon was compelled, under a foreign adjustment, settled in Lisbon, to pay a contribution for losses, which, according to the laws of this country, do not belong to general average; and no sufficient proof was given that, by the laws and usages of Lisbon, such losses were treated as general average there; it was held, that the owner of the goods could not recover from his underwriter his proportionate amount of the sum so paid.² "This contract," said Lord Ellenborough, "must be governed, in point of construction, by the law of England, where it was framed, unless the parties are understood as having contracted on the footing of some other known general usage among merchants relative to the same subject, and shown to have obtained in the country where, by the terms of the contract, the adventure is made to determine, and where a general average (if such should under the events of the voyage be claimed) would of course be demandable."

Secus, in the absence of proper evidence of foreign usage.

Power v. Whitmore.

The law in the United States upon this subject appears to be to the same effect.³

The assumption which pervades the foregoing paragraphs is that no express stipulation appears in the policy by which

By express clause in policy.

¹ *Walpole v. Ewer*, 2 Park, Ins. 898.

² *Power v. Whitmore*, 4 M. & Sel. 141.

³ 3 Kent, Com. 243; see also the cases collected 2 Phillips, Ins. no. 1414. Mr. Phillips classifies the cases under three heads:—1. Where the foreign adjustment merely varies the proportions of the contribution. 2.

Where it brings into general average what by the *lex loci contractus* is particular average, and *vice versa*. 3. Where it brings into general average what, by the *lex loci*, is neither general nor particular average. Admitting the liability of the underwriter in the two former classes of cases, he disputes it in the third. See also Baily, Gen. Av. 199.

the underwriter contracts to pay general average as adjusted at a foreign port; and consequently throughout these paragraphs, the term general average, being assumed to occur in an English policy, can have but one meaning, that is to say, the meaning which would be given to it in an English court of law. In these circumstances it necessarily follows, from what has been said in previous pages, that an English underwriter is not liable except for general average which is proximately due to perils that are insured against in the policy underwritten by him.¹ Perhaps it is better, as a learned judge seems to think it is,² that we should state so much here, notwithstanding the statement may be obnoxious to the charge of unnecessary repetition.

But if there be an express undertaking in the policy, although an English one, to pay general average as per foreign statement if so made up, or to the same effect although by different words, the underwriter thereby renders himself liable to pay according to the foreign average adjustment if made at the proper port,³ in accordance with the law in force at that port,⁴ notwithstanding the constituents of the sum claimed from him on that account are not all of them such as would be attributed to general average by the law of England.⁵ This was so held in one case where a large part of the amount claimed against the owner of cargo in the name of general average, was a sum attributed, and properly attributed, to ship and freight in the apportionment of the general average, but in consequence of the insolvency of the owner of the ship was, by a supplemental average statement in accordance with the foreign law, allocated to the cargo.⁶

¹ Greer v. Poole, 5 Q. B. D. 272.

² Per Brett, J., in Harris v. Scaramanga, L. R. 7 C. P. 481, 496.

³ Hill v. Wilson, 4 C. P. D. 329.

⁴ Harris v. Scaramanga, L. R. 7 C. P. 481; Hendricks v. Australasian Assur. Co., L. R. 9 C. P. 460; Mavro v. Ocean Marine Ins. Co., L. R. 9 C. P. 595; on appeal, 10 id. 414.

⁵ In Mavro v. Ocean Marine Ins. Co. it was argued, but in vain, that although the statement might be foreign, the law of general average should be English: accord. Stewart v. West India & Pacific Steamship Co., L. R. 8 Q. B. 88, 362.

⁶ Harris v. Scaramanga, ubi supra.

It remains that we consider who are the parties legally liable to pay this contribution under the adjustment, and in what mode such payment can be enforced.

Parties liable to contribute, and mode of enforcement.

Primarily the sole parties liable by the law of general average are those upon whose respective interests the contribution has been assessed, namely, the owners of ship, freight, and goods, with right of action over against the underwriters respectively. But in virtue of the contract in the policy, the owner of goods jettisoned may have recourse in the first instance to the insurer for the whole of the loss thereby, and the insurer upon payment is subrogated into the rights of the assured as against third persons.¹

The master, for the recovery of these contributions, has a right to retain the cargo under common law lien,² or enforce his claim by action.³ But the Court of Admiralty had no jurisdiction over the question,⁴ except so far as that it would not deprive the master of his possession of the cargo, without taking care that his lien is satisfied.⁵

In the case of a general ship and many consignees, the practice is for the master, before he delivers the goods, to take a bond from the different merchants for payment of their portion of the average, when the same shall be adjusted.⁶ But the bond which is exacted in these circumstances must be such as is reasonable; and if any stipulation in it be unreasonable, the bond itself is void.⁷ At the same time the shipowner is not bound to accept security; he is entitled to demand payment in money before delivering the goods;

Practice in case of a general ship.

¹ *Dickenson v. Jardine*, L. R. 3 C. P. 639.

² *Simmonds v. White*, 2 B. & Cr. 805; *Scaife v. Tobin*, 3 B. & Ad. 523; per Lord Blackburn, *Anderson v. Ocean Steamship Co.*, 54 L. J. (Q. B.) 192, 196; 10 App. C. 107; *MacLachlan, Shipping*, 692.

³ *Birkley v. Presgrave*, 1 East, 220; *Shepherd v. Wright*, Show. P. C. 18;

Anderson v. Ocean Steamship Co., supra.

⁴ *The Constancia*, 2 W. Rob. Ad. 487; *The North Star*, 1 Lush. 45.

⁵ Per Privy Council, reversing judgment of Admiralty Court in *The Cargo ex Galam*, 33 L. J. (Ad.) 97.

⁶ *MacLachlan, Shipping*, 692.

⁷ *Huth v. Lamport*, 16 Q. B. D. 735, 737, 738.

consequently each consignee is bound to pay the amount demanded by the shipowner, or at his own risk to tender what he thinks is his proper proportion. He is, however, entitled to the necessary account or particulars from the shipowner or the master to enable him to ascertain what is due as his proportion;¹ and if such particulars be refused in whole or in part, or if they be furnished only after the issue of a writ, the shipowner even if he recover his full demand will do so without costs of the action.² The consignee, however, if not owner, is not rendered liable for contribution by the mere receipt of the goods, unless there be an express condition to that effect in the bill of lading.³

Consignee of bill of lading.

The parties severally, and not jointly, liable, unless joint owners.

The parties severally interested in ship, cargo, and freight, are, as a general principle, severally, and not jointly, liable for their respective proportions of the contribution; unless, indeed, they be jointly interested, for in that case they would, on principle, be jointly liable, and have accordingly been held to be so in the United States.⁴ But one of such joint owners, if he have insured his interest separately, is not entitled to recover from his underwriters the proportion paid by him for his co-partner.⁵

Liability of insurers.

The underwriters are directly liable for general average losses, to the whole amount, with right of recovery over against the various contributory interests,⁶ or to reimburse the assured the proportionate or rateable amount of his contribution,⁷ that proportion of it, namely, which the value of his interest as insured bears to its value as estimated for the purposes of contribution.⁸ But neither the assured nor the insurer is necessarily bound to pay what the shipowner may have paid or a proportionate amount thereof, unless it

¹ *Huth v. Lamport*, 16 Q. B. D. 735, 737, 738.

² *Ibid.*, and *The Norway*, Br. & Lush. Ad. 377, 397.

³ *Scaife v. Tobin*, 3 B. & Ad. 523.

⁴ *Sims v. Willing*, 8 Serg. & Rawle, 103.

⁵ 2 Phillips, no. 1411.

⁶ *Dickenson v. Jardine*, L. R. 3 C. P. 639; 2 Phillips, Ins. no. 1348; Pothier, no. 52.

⁷ Boulay-Paty on Emerigon, vol. ii. p. 6.

⁸ 2 Phillips, Ins. no. 1410; *Dent v. Smith*, L. R. 4 Q. B. 414.

be proved to be a sum proper to be paid as and for general average.¹ The value of the ship or goods, as between the assured and his underwriter, is either their value in the policy, or else, in an open policy, their value at the time and place of the ship's sailing; but their contributory value, differing very much from this, is their net value as they reach their owner's hands at the port of adjustment. It is evident, therefore, that the underwriter cannot be at all affected by the latter value, but only by the former.

Thus, suppose goods to be insured in the policy for 500*l.*; let their net value at the port of discharge, *i.e.* their contributory value, be 1500*l.*,—the amount of contribution paid by them to be 150*l.*,—then the underwriter will be liable to reimburse to the assured on goods, not 150*l.*, or the whole of the sum to be contributed, but 50*l.*, or a third of that sum, that being the proportion which the value insured (500*l.*) bears to the contributory value (1500*l.*): or, to put the same thing in another way, the owner of the goods (as one of the parties to the contribution) has to pay in contribution 10 per cent. on their contributory value; but the underwriter has only to pay to the owner of the goods (as his assured) 10 per cent. on their value in the policy. Supposing the contributory value not to exceed the value insured, the rule of reimbursement is still the same. Thus, goods valued in the policy at 500*l.* are valued in contribution at 500*l.* The assured has paid in contribution 50*l.*, *i.e.*, a tenth of the contributory value: the underwriter repays him 50*l.*, or a tenth of the value in the policy.

Hence the rule, "whatever is paid in contribution in Rule. respect of the excess of the contributory value over the value in the policy, is paid by the assured; but for whatever is paid on a contributory value not exceeding the value in the policy, the assured is indemnified on the proportion insured."² This rule may in effect be set aside in

¹ *Anderson v. Ocean Steamship Co.*, 10 App. Ca. 107; 54 L. J. (Q. B.) 192. ² *Magens*, 245; case xix.; 2 Phillips, Ins. no. 1410.

virtue of a stipulation in the policy to pay general average according to foreign adjustment, and by the assumption at the port of adjustment in accordance with the law there prevailing of higher values than those in the policy.

In France.

The rule is the same in France, where it has been decided in the Cour Royale of Aix (30th August, 1822), that, as between the assured and his underwriter, a general average loss is to be adjusted, either upon the value in the policy, or in an open policy, upon the value of the goods at the time and place of loading on board.¹

"When the object," says M. Boulay-Paty, "is to ascertain the nature and extent of the legal liabilities to which the underwriter is exposed in consequence of the contribution which has been assessed on the subject insured, reference must be had to the policy of insurance alone, which is the law really regulating the relations of the parties. The claim of the assured against his underwriter in respect of the contribution is a very different claim from that which he has against his co-adventurers, and flows solely from the stipulations in the policy. Hence, the adjustment, as between the assured and the underwriter, ought invariably to be fixed upon the value of the subject insured at the time and place of the ship's sailing, without any distinction in this respect between general and particular average loss."²

General practice in this country.

In this country the general practice is for the broker who has procured the policy of insurance to indorse the adjusted average on the back of the policy, which is commonly paid by the underwriters, in the first instance, without dispute; and the account, as between themselves and the assured, is settled afterwards.

¹ Boulay-Paty on Emerigon, vol. ii. p. 8.

² Ibid.

NOTE BY THE EDITOR,
UPON THE ORIGIN, MEANING, AND HISTORY OF THE TERM
AVERAGE AS USED IN THE MARITIME LAW.

The term *Average* used in the Law Maritime is regarded as an unintelligible symbol. As such, it has been used for a period probably of eighteen centuries. True, as here written, it wears an English guise; but it is a foreign word. No doubt it came to us through the French; and as *Kick-shaws* is *quelque chose*, so *average* is *avarie* disguised. But *avarie*, according to Emerigon, is a mere unintelligible symbol. As a consequence of that, it readily lends itself to any theory whatever, without the disadvantage of obvious inconsistency or contradiction. I propose to point out, however, what I believe to be its origin, history, and meaning.

All the learning and theory, as far as I know, which have hitherto been employed in the exposition of this term, are so conveniently epitomised by Mr. Stevens that I gladly avail myself of his note.

“The writers on Insurance are not agreed as to the etymology of the word *Average*.”—Mr. Serjeant Marshall (Marshall, p. 538, n.) quotes Cowell, who considers it to be ‘derived from the Latin word *averagium*; which comes from the verb *acerare*, to carry,—and originally signified a service which the tenant owed to his lord by horse or carriage. It is said to have been introduced into commerce, to show the proportion and allotment to be paid by every man according to his goods *carried*.’ Millar (Millar, p. 334) thinks the word is derived from the Saxon *healf*, i. e., half, which corresponds with a word of a similar sound in all the Teutonic languages, pronounced with the *l* mute (Johnson’s Dictionary);—hence the word *halvers*, partners; and *halverage*, partnership. *Halverage* or *average* loss means partnership loss. Perhaps the opinion of this being the most correct derivation may meet with some confirmation from the word being written in the German (a self-derived language), *Haverie*. In the Dutch it is *Aterie*; in the French *Avarie*; in the Italian and Spanish *Averia*. If any person be particularly curious on this subject, he may consult M. L. Boxhorn (in Dissert. ad Arnold. Vinnium J. C.) who pretends to trace back the word to the Arabians and Scythians, from the latter of whom he says the Germans received it and the French from them. Q. Van Weytsen, in his Treatise on *Average*, says that the word is derived from the Greek *Βαρος* (which signifies onus, or weight, trouble, charge), and having the privative prefixed, makes *αβαρος*, (*abaros* or *avaros*)—without charge, which word is made use of when a vessel having made a jettison arrives without its entire cargo.—Be this as it may, it would require some boldness for any one to assert that he had found the true etymology of the word, after the very learned author, Emerigon (*Traité d’Assurances*, tom. i. p. 586), having declared that it is not yet discovered, and that it is probable it never will be.”—Stevens Av. 2.

Nothing so remarkably shows how easily the mind is diverted into error than this conflict of opinion among learned men;—Cowell, following the tendency of his day to explain everything by the feudal system,—

Boxhornius and Marquardus, like our own Selden, yielding to the theological impulse of the sixteenth and seventeenth centuries, to look for an account of all mysteries in the languages of the East,—Millar, with his insular prejudices, satisfied of the term being Saxon in origin because of its forced coincidence in form with an English word,—and the others, including the very learned Emerigon, too familiar with the term under its original form in a very secondary sense to discover an old friend under a slight disguise.

Origin, history, and meaning of the term.

Le mot *avarie*, says Emerigon, est usité dans les places de commerce. This admitted fact, that the same term applied to the same uses is to be found in the language of every maritime country in Europe, leads me to a very plain inference,—the term is Latin, or it must have descended to us through that language. This seems to me to be a condition imposed by the state of the facts upon any explanation that may be offered; the word is portion of the heritage descended from classical Rome to modern Europe.

Now I do find the form of this term in a very familiar classical word. I shall moreover show by an adverbial fragment from the language of the forum and the market-place of ancient Rome that the peculiar meaning which we professionally give to this term *average* was at one time appropriated to the classical word in question, but afterwards so entirely perished that the adverbial fragment I refer to became etymologically unintelligible. When I say, however, that it *perished*, I mean that it ceased from among men on shore. But that the term and the signification attached to it survived in union at sea is evidenced to our own day, as I have said, by their preservation in union in the language of every country on the European sea-board. This evidence is the more striking, that by the archaic guise which it generally wears, it continues isolated though familiar.

Its original form.

The classical term which I refer to, as the original of *average*, *avarie*, *averia*, is *Aversio*. I need not point out how naturally, from its etymology, it would lend itself to the purpose of the Lex Rhodia to designate—*first*, the effect of jettison (*jactus*), the averting, namely, of destruction from the whole adventure (*aversio periculi*) by sacrifice of part,—*secondly*, the loss sustained by the sacrifice, as the thing chiefly considered after the peril was over and the co-adventurers were once more at land,—*thirdly*, the result of all, the contribution wrangled about among these co-adventurers when at their ease, and shortly called by them *aversio*, being in fact the *pretium aversionis* according to the first meaning, and the *contributio ad aversionem* according to the second. That each of the three should come to be called *aversio* is in accordance with what we know of the exigency of business for laconic phraseology, and with our daily experience of the economical shifts that men are forced to by a meagre vocabulary. The word *Average* is used at this hour in the high places of the law and of commerce after this manner in the same three senses.

In this form and use it is obsolete.

But since I am obliged to own that this use of the simple form *aversio* has entirely disappeared from all the literary remains of ancient Rome, not excepting her laws and legal commentaries, have I anything besides the mere form of the word and my own imagination to justify the inference that it ever was in use in this signification?

Except in one phrase.

As I have said, there is an adverbial use of the word in a sense as incomprehensible etymologically to grammarians, as the origin of the modern term *avarie* is to lawyers, but when both are brought into juxtaposition, *avarie* with

ex aversione, there is such a solution of difficulties on both sides,—difficulties of form and origin on the part of the modern term,—difficulties of meaning etymologically considered on the part of the ancient fragment, as should convince every one that the light thus given forth is the effect of truth, and that the identification of the modern with the ancient term is beyond question. Let me assume, for a moment, this conclusion as admitted, in order that I may show how natural among such a people as the ancient Romans was the loss of the term as a sea phrase, and also how intelligible was the salvage, among the same people, of this fragment from the embrace of the ocean to serve the purposes of civic life.

They were a people incapable of any zest for maritime pursuits. They have given evidence, however, to the latest posterity of having been possessed with the loftiest genius for legislation and government. It is probable that we cannot appreciate with what a generous pleasure this people would regard the equity and beneficence (*æquum et bonum*) involved in the principle of the *Lex Rhodia*. Cicero, before the citizens in comitia assembled, celebrates the *Rhodiorum usque ad nostram memoriam disciplina navalis et gloria*; and six centuries after Cicero, the Roman legislators were still not so degenerate but they devoted a whole title of the Digest to the *Lex Rhodia de Jactu*. I refer to this law and to the large space it filled in the public eye during those times as accounting for the familiar use of a phrase attributable wholly to maritime pursuits and the forensic discussion of questions arising upon these in connection with the *Lex Rhodia*.

On 'Change, as we should say, and among the lawyers, they were accustomed, probably earlier than the time of Cicero, to speak of buying, hiring, or letting *ex aversione*. The general meaning of this phrase survives, but the etymological origin and significance of it have baffled all writers. See *e.g.*, the *Lexicon Juridicum Calvinii*, and *Facciolati*. Some propose to change the word to *adversio*; others, more faithful to tradition, retain the true word and suggest various explanations, all fanciful and most of them ludicrous, the least unpalatable of all being, *e.g.*, *ex aversione oculorum*,—a pig in a poke mode of buying, which I need not say is in great esteem (!) with all shrewd purchasers, the pick and choice of whom I am here dealing with.

The general meaning of *ex aversione emere* was to purchase for a lump sum, to buy in the gross, to give a sum out of hand and assume all the risk. The first occasion of such a phrase and meaning was so lost in the time of Gaius that the adverbial form is corrupted to *in aversione* (see Dig. 18, 1, 62 *ad finem*) and even *per aversionem*. But, in its proper form, how picturesque and significant a phrase does it become when viewed in relation to the *jactus* of the *Lex Rhodia*! Those who have ever seen the purchase of a *job lot*, as the same thing is called among us, will appreciate the complex figure conveyed by this expression,—first the notion of flinging away of the lump sum (*jactus*—a favourite notion certainly with the purchaser), and the assumption of all risk on the shoulders of the buyer alone, so as to remove (*aversio*) all responsibility from those of the seller. See the Digest *ubi supra*. The original from which this picture is drawn is that general average act at sea by which one of the co-adventurers sacrificed to the vengeance of the waves a portion of his goods and took upon his own shoulders the peril of all the others. Such an act, amid circumstances such as they always spoke of with dread, seems to have kindled the imagination of the early Romans; they carried the thought of it with them from the discussion of the forum into the

Origin of this phrase among the Romans.

Use of it among the Romans.

Etymological origin and sense of this ancient phrase.

business of the market place, and it yielded them in both places an expressive phrase that served the chaffering traffic of the trader and the discriminative arguments of the lawyer. In this single fragment of an ancient language we discover, it seems to me, the history and nomenclature of what we have been accustomed to call general average, as vividly as if but yesterday we had listened to a case of *Aversi* from the Adriatic, discussed before the Prætor between Cicero and Hortensius.

History of this phrase and of the sea term.

It may have been about the time of these distinguished men that a severance began in the history of these terms. Civil life had obtained a phrase which it urgently wanted. The phrase lived on amidst the technicalities of the market and the forum, suffering such alterations as ignorance of its origin was sure to effect, yet never such disfigurement as to become unfit for the presence of the Prætor, or unworthy of a place among the noble remains of ancient legal philosophy. The original term, however, was, at the same time, as indispensable to the daily concerns of the population on the Mediterranean shores. The term ceased from city life, went down to the sea in ships with the merchant adventurers of those times, and was already inured to the dangers of the deep when these came to be dared by the hardy children of the North, who swarmed over the territories and seas of the great empire, and everywhere welcomed this Roman stranger to their ships and to their homes.

The sea term.

The loss on shore of this ancient sea term is not so remarkable as its survival afloat these 1800 years, so little altered from its original form, and though so little altered, so totally unrecognized under the slight disguise it wears, domiciled and yet a stranger to the present hour in the language of every commercial country.

Next stage of its history.

Quite as singular, however, is the next stage of its history. Naturally enough an account of the origin of Marine Insurance is hopelessly lost. Vain attempts have been made to discover its existence among the remains of the Roman law. Its original designation seems to have been *Asscuratio*, a barbarism, converted by Continental merchants into *Adseurantie* and by ourselves into *Assurance*. Classical writers upon the law merchant in the sixteenth and seventeenth centuries, wrote of it, however, under the designation *Aversio periculi* vulgo *Asscuratio*. See Loccenius, 979. Singular as may seem this revival of an ancient classical term so completely lost to use in its maritime signification, more singular perhaps is the dual existence which it hereby obtained, as it seems to have continued unrecognized, unidentified with the *averia*—*averie*—*avarie* of daily life. C'est à dire, says Emerigon (vol. ii., c. xvii. s. 9, p. 255), c'est à dire comme si l'entreprise nautique eût été étrangère à l'assuré. Le péril est renversé sur l'assureur; *Asscuratio est aversio periculi*.

Full effect of this term in Marine Insurance.

Much more to my purpose is it that the modern reader should compare the two terms, and, from the undisguised classical form in this new connection, should comprehend the full meaning of the other, which in no long time once more usurped the place of the classical term, and now continues to fill that place with all the significance of the more intelligible word. See the citation from Emerigon, *supra*. Just as *Aversio* successively designated first what we call general average, and secondly Marine Insurance, the corrupted form of it better known to sea-life succeeded to these two functions, coupled with a distinctive epithet to point out in which it is to be accepted. Average, as the English form is of this ancient classical term, when used in

connection with the contract of marine insurance, signifies the whole purpose of that contract—namely, the *averting* from the individual adventurer, by interposition of the underwriter, of all the immediate consequences of the perils mentioned. This is the only use of the term appropriate to the subject of the present treatise. This is *Particular Average*, as it is commonly called, to distinguish it from that other use of the same term which forms the subject of the present chapter.

Before I had written the preceding note, or had thought of doing so, I had been accustomed to hear, and never without a sense of disappointment, Dr. Johnson's Dictionary definition of the English word *Average* referred to in our Courts as an authority on questions of *Average* in the law of Marine Insurance. Disappointed, as I have said, and pained by such a reference, I hoped by pointing out the use of the legal term as a symbol for the same set of legal ideas among the maritime nations of Europe to convey to those who had less time for the investigation some flavour of the ancient learning and of the sea commerce with which it comes associated to us, if peradventure they might be induced to look elsewhere for light and assistance in the forensic discussion of such questions. Such was the main object I had in view in entering upon the investigation; and whatever else might have mingled with my thoughts, they certainly never were directed to the aim of etymological research. For I have always been accustomed to consider that such an aim is beside the purpose of a law treatise. Nor am I now to suffer myself to be led aside from that purpose by the etymological researches of others. I will not pronounce upon the merits of a suggestion of that order recently made by Mr. Lowndes in his treatise on General Average. And if I advert to what he says of the above Note, I do so for the sake of the occasion that it gives me to develop somewhat further my original suggestion, in the hope that others, with more facilities and information under their hand, may be induced to press the inquiry in the direction of what appears to me to be a very curious history. For it is in this view that it is so fascinating to the mind, as a point of shy, fugitive history, identified at its source with the feelings of our common nature, and traceable in its descent through time as it crops up strangely at distant intervals in the legislation, or other commercial remains, of the maritime nations of Europe.

My friend Mr. Lowndes is in error when he says that I have endeavoured to connect this term *Average* "with the *actio de aversione* of the old Roman law," or with "the forms of Roman law." Moreover, there never was any such *actio*, and I am afraid he is scarcely aware how technical and special is the sense of his phrase "forms of Roman law." And when he says that the term *Average* "did not come into use till many centuries after the forms of Roman law had been laid aside and practically forgotten," Mr. Lowndes is venturing upon an assertion which no one in Europe or in the world, himself not excepted, is in a condition at this time to verify. But as he does pretend to verify this very large assertion, I give his verification in his own words. "The word *Average* is not to be found in the Digest, nor is it in any of the older Sea Laws which were, like the laws of Oleron, of general authority throughout Europe. It is not in the *Consolato del Mare*. If we except Italy,"—[my friend has found, in a transcript of Italian law from mediæval times given in Pardessus, a use of *avere* for goods, possessions, such as is made of it in Italy to this day, and an old fragment *varca*, in the sense, he says, of contribution, which to him looks like the same *avere*. It does

Above note
reconsidered.

not occur to him that this *varca* might be the time-worn form of the *aversio* of ancient classical times,]—"If we except Italy," Mr. Lowndes continues, "it is not to be traced in Europe to an earlier date than the Guidon, that is than the 16th century." My friend is very much at his ease in making assertions: this certainly is a large one.

Now, if I allow for fact the smallest half of this assertion, which even then is surely large enough for the faith of his readers—namely, all that about the Digest, and as many codes in addition as he chooses to include in the statement—I have to remind him and his readers that all that is utterly beside the point when adduced as evidence against my suggestion in the above *Note*, which any one that reads it will see presupposes the very thing he here alleges. The very pith of my suggestion is, that from very early times what is known to us now as General Average existed as a *practice*, and that, though not so early, yet from an early period, it existed as a *Law*; but that this existence continued for centuries to be a dual existence of Practice and of Law, with little, if any, reference from one to the other—the one, altogether maritime, pursued by average adjusters in the Mediterranean ports; the other a scientific principle, in the hands of a learned profession congregated in the great inland cities of those times.

Dual exist-
ence of
General
Average in
Ancient
Times

As in Modern
Times.

Men will hardly remain sceptical of the possibility of such a dual existence if they listen to evidence which I think is very cogent on this point.

The Statute Law of England from the earliest enactment up to the year 1867 fills ONE HUNDRED AND SIX octavo volumes of about 500 pages apiece, and yet the word average, in the sense of general average, will not, I believe, be found once in all these volumes, if we except from them the Lloyd's policy, a purely commercial instrument not owing its origin to the Legislature, which the Legislature have embodied once, or it may be twice, in statutes passed merely for the purposes of revenue. Again, taking the Reported Cases from the earliest of the Year Books up to the year 1756, when Lord Mansfield became a judge, I find them comprised in about ONE HUNDRED AND SEVENTY-THREE volumes of various sizes—folio, quarto, octavo—and in all this matter, being the daily record of the life of the English nation, I have not succeeded in finding more than two cases bearing upon this subject, and containing mention of this term. In this immense mass of printed paper, bound up in 279 volumes, being the written law of the greatest maritime and commercial people the world has seen, extending with the progress of affairs and the springing up of contentious disputes, year by year, over a period of about six centuries, not being a digest, nor a collection of random clippings by any Tribonian, but the garnered wisdom of England in relation to the chief interests of her people, this term probably occurs in three obscure passages and no more. At the same time the *Lex Rhodia* confessedly had a professional existence in England, for in the work of Molloy *de Jure Maritimo*, published in the time of Charles II., he devotes a chapter to *Averages*, chiefly made up from the title in the Digest, and of references to the two English cases already mentioned.

Notwithstanding this singular abstinence of the English Law from mention of it, the term yet lives at the present day in the mouths of men in the chief places of commerce, and has done so any day these three hundred years past, with all the vitality and commotion proper to a symbol of losses and conflicting claims and competing interests. This possible contradiction between the existence of a commercial practice and the absence of notice of it in the laws

and legal records of a commercial country is assumed by Mr. Lowndes, in the passage quoted, to be impossible, or the evidence he adduces is worthless for his purpose.

My friend, when he came to write his Introduction, may have forgotten his theoretical arguments in favour of his antiquarian etymology. In the first dozen lines of the volume he says,—“It is not too much to say that during this period [the last sixteen years] this little branch of law [General Average] has quickly passed from the traditionary to the written stage. Formerly, it was governed by what were called the ‘Customs of Lloyd’s.’”

This is exactly the state of things which I ventured to hint in the above Note as having existed for centuries before the Christian era around the Mediterranean seaboard. I could certainly see, “in my mind’s eye,” the Stevenses, and the Richardses, the Davisons, and the Lowndeses of those times, men distinguished at that day for their facile power of arithmetic, their experience of maritime affairs, and their logical discrimination, each in his chosen port, passing from ship to ship, in the manner of his predecessors, this one with his board and chalk, that one with his waxen tablets and stylus, smoothing difficulties, adjusting claims, convincing the obstinate seaman or mercator by a little argument and a slight lesson in arithmetic on his finger ends, and then exhibiting on his tablets the final results of the effect of the sea perils during the adventure. These were men that arose with the need there was for them; and the necessity by which they were bred arose out of the nature and circumstances of maritime commerce in connection with the perils of the sea. For these men the sanction of their practice lay in convenience and natural right, and the principle which they applied would vary in development with the genius and capacity of each and of the predecessors into whose heritage he had come. By what Solon or Numa, and in what age, their practice came to be formulated into some such law as that which we still call the *Lex Rhodia*, as they in all probability knew not, so it were idle speculation for us to inquire. Even after such a law had been promulgated, those ancient average adjusters continued, no doubt, for centuries as unconscious of the law as we are now of its author.

Ancient Practice of General Average.

But were they without a name to designate the object and the end of their daily labour? It is contrary to our nature to suppose it; in fact, an impossibility. Business requires, but abbreviates, talk; and a common purpose frequently arising comes to assume a single word for its name: a name that may be characteristic, it may be casual, or it may be wholly unaccountable even to contemporaries; but a name it necessarily assumes.

Its Name.

Now the occasion for the average adjuster arose on shipboard in the presence of death. *Avertamus!* would be the word on the lips of every Roman who had presence of mind to help himself. Not one of them, having once looked death in the face and compromised with him by the sacrifice of property, could ever forget the *Aversio*. It was the first, the last, the only word in the Roman vocabulary of these seafarers suited to their lips and to the circumstances. On land, the parties to the dispute had been parties on shipboard to the sacrifice and the terror. *Aversio* was enough for both, therefore; and the adjuster was content to accept their own term and profit by his practice.

Origin of its Name.

On the other hand, no such necessity for a name was laid upon the juriconsult at Rome. To him the subject first came, already formulated into a law. For him the place of its origin, the island of Rhodes, would be a

Why Name unknown at Rome.

designation quite as serviceable as the name of the author of its existence, had it originated in Rome. The Consular name, or the names of both Consuls joined, sufficed to designate the law of the year; unless such an innovator as the first Cæsar were the author, and then to distinguish the *Leges Julæ*, the object of the particular law was conjoined. (See the *Index Legum*, by Orellius and Baiter, in their edition of Cicero, *passim*.) In fact, to a Roman juriconsult, thus accustomed to distinguish the legislation of his country, such a word as *Æversio*, wanting for him the terrible meaning which it carried to the mind of the parties to a jettison, would be as the *slang* of sea pedlars—to be heard and flung aside with contempt. Thus it might continue to be in the private practice of these juriconsults for years, nay, generations.

Till a Casual
Accident gave
it currency.

At length a case of unusual complexity in facts and interests, and involving unusually large sums, might well arise at such a port as Marseilles among the wily Greeks of that emporium, and each, with pretensions that brooked no compromise, might, without fear of detection, contend that the whole result of the case turned in his own favour. The local adjuster states the case; the local judge is only the means of getting it appealed to Rome; the patrons of each side, stimulated to unusual exertion by unusual fees, exercise their keenest skill and their most powerful rhetoric; and the idle frequenters of the forum that day are outnumbered by a great levy from the better classes, drawn by the rumour of a suit originating in the very crisis of death and destruction amid the sea waves, a claim called by the uncouth and to them ridiculous designation—a claim *ex æversione*—to hear it related and argued before the Prætor. It was indeed to them some new thing. It made a great impression. It was a nine days' wonder. And then it died away from the memory of the Romans. But the phrase for its brief uncouthness, after living in the slang of the streets, came to serve the necessities of the market place, and continued to do service in this inland capacity long after its origin had been wiped from the recollections of the Roman citizen.

The Name
lived with the
practice, of
course.

Meanwhile the local practice of adjustment continued as before in the ports of the Mediterranean. And just as the sea suffered no change by all the convulsions that upheaved and at length overthrew the mighty empire about its margin, so the peculiar habits and vocabulary born of that sea in those ancient mariners and their dependants continued as they had been, and were bred in successive generations of men as they rose, rank behind rank, in the long course of centuries, seeming to show but little change whether the men they served to characterise acknowledged a Roman Emperor or a British Queen. The term *æversio* needs must suffer defacement, when the language that gave it life and form ceased from living use, and left it a fragment tossed to and fro by the waters of the great deep. With some of its angularity gone, through the abrasion of time and uncouth circumstances, as it rolled down the current of centuries, here turning up as *averia*, there as *aværa*, in one place as *avarie*, in another as *average*, there is still, I think, enough to identify it to the mind of the scholar with the *ex æversione* of ancient Rome, and to conciliate assent by the light which it gives and receives in that connection.

CHAPTER V.

PARTICULAR AVERAGE.

What it is - - - -	927	on Goods - - - -	928
and is not - - - -	927	Ship - - - -	939
How adjusted - - - -	928	Freight and Profits - - - -	949

A PARTICULAR average loss is, by the law of this country, such loss or damage as is accidentally and proximately caused to the subject insured by the perils insured against. What it is.

Extraordinary expenditure properly incurred for the purpose of preventing or mitigating a loss which would otherwise accrue or increase, and would fall accordingly upon the insurer, is recoverable from him in virtue of his express stipulation to that effect in the *sue and labour* clause of the policy.¹ Such expenditure is not particular average by the law of this country, although sometimes it is popularly so called. By the law of France, however, it is expressly included under the term.² What it is not.

Many small charges occurring regularly in the usual course of the voyage, and which the master, in the ordinary course of his duty, necessarily furnishes for the purposes of the ship and cargo, are called petty averages. These are never the subject of any claim on the underwriter; but were formerly, and in some cases still are, borne, one third by the ship, and two thirds by the cargo. Bills of lading in use formerly did invariably, and sometimes do still, contain a provision for the payment of *average accustomed*.³ These charges are all the Petty averages.

¹ *Kidston v. Empire Marine Ins. Co.*, L. R. 1 C. P. 535. Ins. 217; 2 Marsh. Ins. 540; 2 Phillips, Ins., no. 1269, note; Benecke,

² *Co. de Com.*, art. 403; 4 Boulay-Paty, *Droit Mar.* 481. Pr. of Indem. 165; Stevens on Average, 3.

³ *Abbott on Shipping*, 282; 1 Park,

ordinary charges at the places of loading and unloading, and during the voyage; such as common pilotage, tonnage, light money, beaconage, anchorage, ordinary quarantine, river charges, signals, instructions, passage-money at fortified places, expenses for digging a ship out of the ice when frozen up in the regular course of the voyage, &c.¹

Of course, if any of these charges be incurred for any extraordinary purpose, or to relieve the ship and cargo from impending danger, they will, as we have seen, be general average.

Adjustment
of particular
average.

We have already considered in previous chapters what losses are or are not in the nature of particular average within the meaning of the policy, and the principles on which that question must be determined. We propose to consider in this chapter the principles and rules which govern the adjustment of any loss when it has been ascertained to be a particular average loss.

On Goods.

First, we confine our attention to the adjustment of such a loss on goods.

The true method of ascertaining the amount which the underwriter ought to pay, in order to indemnify the assured for a particular average loss on goods arriving sea damaged, depends mainly on the following elementary principle of insurance law,—that the value upon which the premium is paid is, as between the assured and the underwriter, the sole value to be regarded in estimating the amount of the underwriter's liability: he pays no loss upon that for which he receives no premium.²

¹ See note 3, *ante*, p. 927.

² In order to avoid all misconception, let it be remembered that each separate underwriter pays only upon the actual sum by him subscribed. Thus, if five underwriters have each

subscribed 200*l.* on a policy on goods valued at 1000*l.*, and the goods arrive damaged one-fourth, each underwriter will have to pay 50*l.* as his quota to make good this loss, *i. e.*, one-fourth of 200*l.*: the five underwriters will

Now in a policy on goods, unless otherwise stipulated, this value is either, in an open policy—their prime cost (*i. e.* their invoice price at the port of loading), together with all expenses till put on board, including premium and cost of insurance,¹ or else—in a valued policy, the value expressed in the policy. Hence the sole basis upon which a particular average loss on goods can be adjusted is, as regards the underwriter, either their prime cost on board, or their value in the policy.²

What value is basis of adjustment.

We have already proved elsewhere, that in valued policies the valuation in the policy is the sole standard of the underwriter's liability in all cases of particular average loss, except where it is fraudulent, or where only part of the full intended cargo to which alone the valuation was meant to apply has been shipped on board at the time of loss.³

From this principle it follows, that the amount which the underwriter has to pay, in respect of a particular average loss on sea-damaged goods, cannot at all depend upon the higher or lower market price which such goods may fetch at their port of destination on arrival. Market price at the port of arrival is the sum at which the merchant can afford to sell there to a consumer, after paying freight and all charges, and either realising a profit or submitting to a loss. It is composed of three constituent parts—1. Prime cost on board; 2. Freight, duty, and landing charges; 3. Profit in a gaining, or loss in a losing market.⁴

The first alone of these, *i. e.* prime cost, or else value in the policy, is that with which the underwriter on goods is concerned. He has not insured against loss by freight, &c. ;

pay collectively 250*l.*, or one fourth of 1000*l.*, the whole amount of the valuation.

¹ *Tuite v. Royal Exch. Ass. Co.*, 1 Park, *Ins.* 224, 225; *Usher v. Noble*, 12 East, 639; *Waldron v. Coombe*, 3 Taunt. 162.

² *Usher v. Noble*, 12 East, 639; *Tuite v. Royal Exch. Ass. Co.*, 1 Park, *Ins.* 224, 225; *Stevens on Average*,

178; *Benecke, Pr. of Indem.* 12—14.

³ Ante, P. I. Chap. IV., pp. 303, 305; *Forbes v. Aspinall*, 13 East, 323; *Rickman v. Carstairs*, 5 B. & Ad. 657; *Tobin v. Harford*, 32 L. J. (C. P.) 134; *id.* 34 L. J. (C. P.) 37; 13 C. B. N. S. 791.

⁴ *Benecke, Pr. of Indem.* 3; *Stevens, Av.* 85.

Principle of indemnity.

he has not insured against loss of expected profit. In the language of Lord Mansfield, he only "engages so far as the prime cost or value in the policy, that the thing shall come safe; he has no concern with any profit or loss which may arise to the merchant from the goods; he has no concern with any subsequent value."¹ The principle of indemnity, the basis of marine insurance, as practically adopted in this country, is, that the underwriter on goods, engages,—not to put the merchant in the same condition he would have been in had his goods arrived safely at the port of destination,—but solely to put him, in regard to such goods, in the situation in which he was at the beginning of the risk.

Distinction between depreciation and indemnity.

There is, therefore, an important distinction running through the whole of this branch of Insurance Law; *vis.*, that the extent of loss the assured on goods sustains by sea damage is one thing, the amount which the underwriter has to pay in respect thereof is quite another. Accordingly, when goods arrive sea-damaged, two points are to be ascertained; first, what depreciation in value the goods have suffered; secondly, the amount which the underwriter ought to pay in respect thereof.

Depreciation, how ascertained.

The first point is ascertained by simply comparing the price for which the goods would have sold in the market, had they arrived there sound, with the price for which they actually do sell, arriving there damaged.

Generally speaking, in practice, the damaged goods are actually sold by public auction, and the amount they realise is called the proceeds of the damaged sales; the value which they would have sold for, if sound, is estimated by supposing them to be sold at the current price for sound articles of the same kind in the same market, and the amount supposed to be realised by these *pro formâ* sales is called the proceeds of the sound sales.² The difference between the market price of the sound and the market price of the damaged goods, or,

¹ Lewis v. Rucker, 2 Burr. 1167, 1170; Stevens, Av. 119.

² Benecke, Pr. cf Indem. 435; Stevens, Av. 83—85.

in technical language, between the sound and damaged sales, gives the direct amount of the merchant's loss.

But this cannot be the amount the underwriter has to pay; for, first, it would make the market price of the goods at the port of destination the basis of the underwriter's liability, when, as we have just seen, the only true basis of such liability is, their prime cost at the port of loading; secondly, it would involve the underwriter in the rise and fall of the markets, with which, as we have also seen, he has no concern, that is, for the same amount of sea damage he would have to pay more when the goods come to a gaining, and less when they come to a losing market;¹ while the desideratum is, to obtain some uniform measure, or standard of value, by which the amount the underwriter has to pay, in respect of a particular loss on damaged goods, shall be always the same when the proportional extent of damage is the same.²

The object, then, in comparing the proceeds of the sound and damaged sales for the purposes of indemnity under the policy, is not to ascertain the direct amount of the merchant's loss, but its relative amount—the proportion, that is, which it bears to the price at which the goods would have sold if sound; the question being, not whether the depreciation amounts to any given fixed sum, but whether it

¹ This will be obvious from the following example.

Let the prime cost of the goods be 500*l.*; the amount of loss by sea damage be half the sum for which they would have sold, if sound; the profit or loss be half the prime cost.

Then take,

(1) A losing market.

Goods, if sound, would have sold	
for half prime cost -	£250
Being damaged, did sell for half	
that sum -	125

Difference between sound and da-	
maged sales (merchant's loss)	£125

The underwriter on a losing market would, on this principle, pay 125*l.*

Take next,

(2) A gaining market.

Goods, if sound, would have sold	
50 per cent. above prime cost	£750
Being damaged, did sell for half	
that sum -	375

Difference between sound and da-	
maged sales (merchant's loss)	£375

The underwriter on a gaining market would pay 375*l.*, though the amount of deterioration is the same in both cases.

² Stevens on Average, 119.

Indemnity payable, how ascertained.

amounts to one half, one fourth, or one tenth of the sum for which the goods would have sold, if sound; whether, in a word, the commodity is one half, one fourth, or one tenth the worse for the sea damage; when this is ascertained, the liability of the underwriter is ascertained also, for he pays the same proportional part, whether it be one half, one fourth, or one tenth of the prime cost, or value in the policy.

Rule of Lord
Ellenborough
in *Usher v.*
Noble.

"The difference between the sound and damaged sales affords the proportion of loss in any given case, *i. e.*, it gives the aliquot part of the original value which may be considered as destroyed by the perils insured against; when this is ascertained, it only remains to apply this liquidated proportion of the loss to the standard by which the value, as between the assured and the underwriter, is calculated (*i. e.* the prime cost or value in the policy), and you have the one half, the one fourth, or the one tenth of the loss in terms of money."¹

Thus the sum which the underwriter will have to pay will depend solely on the relative extent of the loss, and will be the same whether the goods arrive at a gaining or losing market.²

In short, that which the assured loses by the depreciation

¹ Per Lord Ellenborough in *Usher v. Noble*, 12 East, 639, 647.

² Take the same data as in note 1, p. 931: let the prime cost be 500*l.*; the depreciation, half the value of the sound sales; the profit or loss, half the prime cost.

Then,

(1) On a losing market.

Produce of sound sales (there being 50 per cent. loss on prime cost) - - -	£250
Produce of damaged sales (being half the sound value) - - -	125
Difference between sound and damaged sales (<i>i. e.</i> merchant's loss) - - -	£125

But 125*l.* is one half, or 50 per cent. on 250*l.* (the proceeds of the sound sales); the underwriter pays one half or 50 per cent. on 500*l.* (the prime cost), *i. e.*, he pays 250*l.*

(2) On a gaining market.

Produce of sound sales (being 50 per cent. over prime cost) -	£750
Produce of damaged sales (being half the sound value) -	375

Difference between sound and damaged sales (merchant's loss) £375

But 375*l.* is one half, or 50 per cent. on 750*l.* (the proceeds of the sound sales); the underwriter pays one half, or 50 per cent. on 500*l.* (the prime cost), *i. e.* he pays 250*l.* as before.

of his goods is an aliquot part of the market value for which they would have sold had they arrived sound at their port of destination; that which the underwriter pays in respect of such loss is the same aliquot part of their prime cost, or value in the policy. Thus if the damage amounts to half the sound value of the goods, the underwriter pays half the sum he has agreed to insure; if to a third, then he pays a third of that sum, and so on in exact proportion to the extent of the depreciation.¹

Even after this rule of adjustment was established, it was for some time doubted whether the amount of depreciation on the sea-damaged goods was to be ascertained by comparing together the net or the gross produce of the sound and damaged sales. The question came on for consideration in the Court of King's Bench, when it was established by Lawrence, J., in one of the ablest judgments ever delivered in Westminster Hall, that the true rule of adjustment is, that the percentage, or aliquot part, which the underwriter has to pay of the prime cost or value in the policy, must be ascertained by comparing the gross produce of the sound with the gross produce of the damaged sales;² and this is now invariably acted on in practice as the true rule of adjustment.

As goods sold in bond are sold subject to the duty only, if the amount of duty to be deducted is not an invariable charge, but varies with the amount of the damage, it is obvious that the adjustment of a particular average loss on damaged goods sold in bond may be made upon a comparison either of the net or gross proceeds, *i. e.* of the amount of the sales, either including or excluding the duty.³

The comparison of the gross produce.

Adjustment on goods sold in bond.

¹ *Lewis v. Rucker*, 2 Burr. 1167; *Hurry v. Royal Exch. Ass. Co.*, 3 B. & P. 308; *Johnson v. Sheddon*, 2 East, 581; *Usher v. Noble*, 12 East, 639.

² *Johnson v. Sheddon*, 2 East, 581, generally known at Lloyd's as the

"Brimstone Case," from the nature of the subject insured, which was a cargo of brimstone and shumaak; *Stevens on Average*, 92.

³ For detailed proof of this, see *Stevens on Average*, 137—147; *Bencke, Pr. of Indem.* 430—434.

Adjustment
on a total loss
of part.

When an integral part of the goods insured is totally lost, as, *e. g.* where one case or package out of several cases or packages of the same description of goods is burnt, or has all its contents washed clean out of it, or goes in bulk to the bottom of the sea, the underwriters will have to pay the same proportion of the value in the policy which the goods lost bear to the whole goods of the same description comprised in the valuation; in other words, the exact amount lost must be paid for at its value in the policy.¹

Adjustment
where there is
a total loss of
part, and also
a particular
average loss
of part.

When such total loss of part, and also a particular average loss, both occur on the same interest; as, for instance, if of twenty hogsheads of sugar ten be totally washed out, and ten damaged by sea water, the most correct practice is to adjust them separately; but this is not absolutely necessary, as, whether they are involved together or separated, the result is precisely the same.²

Adjustment
where, of
several dif-
ferent articles
insured
together, each
arrives sea-
damaged.

But where several articles are insured together in the same policy, and each suffers a particular average loss by sea damage, the loss must be adjusted separately on each, even though the clause "to pay average on each species as if separately insured" be not inserted in the policy; for otherwise, the underwriter would be involved in the rise and fall of the markets, except in the very improbable case when the state of the markets at the port of arrival is alike as to all the articles, *i. e.* when all the articles, had they arrived sound, would have realized in the port of arrival exactly the same percentage of profit and loss upon their first cost, or valuation in the policy.³

Sale of sound
and damaged
goods to-
gether.

When out of whole packages or bales of manufactured goods only a few articles or pieces in each arrive sea-damaged

¹ Stevens on Average, 150; Benecke, Pr. of Indem. 150.

² Benecke, Pr. of Indem. 439; Stevens on Average, 151, 152, who give the proof.

³ This is most ingeniously and incontestably proved both by Mr. Benecke and Mr. Stevens; by the

former algebraically, and by the latter arithmetically: the proof, however, in its detail, is too long for insertion here, and the reader is, therefore, referred to Benecke, Pr. of Indem. 441, note †, and Stevens on Average, 153—155.

it is a frequent practice to sell the sound and damaged goods together at the same auction. The practice does not appear objectionable; but it must be carefully borne in mind, that in adjusting the average on such a sale, the diminished value at which the sound part of the package may sell, owing to the assortment being broken, is not a loss for which the underwriter is liable: for, as Mr. Stevens observes, "he is accountable only for the actual damage done to the thing insured, and engages to guarantee the assured against the direct operation of sea damage, but not against the consequential results."¹

As, however, sales by auction of the damaged goods are resorted to mainly with the view of comparing the sound and damaged values, so as to ascertain the amount of indemnity which the underwriter has to pay; and, as the charges of these sales need not have been incurred if the goods had not been insured, they are to be borne by the underwriter, though not a part, nor a direct consequence, of the sea damage. Accordingly, these extra charges (consisting mainly of brokerage, lot money, commission to the agent of the underwriters, &c.) are added separately to the amount of the loss, after its quantum has been ascertained, and then the whole is apportioned on the underwriters in the usual way.² Where, in an action on a policy, the jury had found a verdict for an average loss, the Court would not grant a new trial, on the ground that it should have been left to the jury to determine whether these extra charges of the damaged sales should be borne by the underwriter or not; as that point was in the discretion of the arbitrator by whom the amount of the loss was directed to be ascertained.³

Generally speaking, a particular average loss on goods is adjusted at the port of destination, and, in such case, the adjustment ought always to be conducted in the manner

Extra charges
of damaged
sales.

Sea damage
on goods sold
in ship's port
of distress ad-
justed as a
salvage loss.

¹ Stevens on Average, 155—158; Benecke, Pr. of Indem. 437, 438. See, accordingly, *Cator v. Great Western Ins. Co. of New York*, L. R. 8 C. P. 552.

² Stevens on Average, 148—150; Benecke, Pr. of Indem. 436, 437.

³ *Hudson v. Marjoribanks*, 7 Moore, 463; *S. C.* but not *S. P.*, 1 Bing. 339.

above described. If, however, a ship in the course of her voyage is obliged to run for a port of distress to repair, and the cargo being necessarily unloaded for that purpose, it is discovered that the whole, or part of it, is so damaged that it would probably be wholly spoiled if reloaded and sent on, and, therefore, to prevent further deterioration, it is sold on the spot for the benefit of all concerned, in such case the claim must be adjusted as a salvage loss—that is, the underwriter pays the difference between the prime cost or insured value of the goods, and the net proceeds of the damaged sales, *i. e.* their market price after deducting all expenses, including freight, where any is due.¹

Adjustment
on goods at an
intermediate
port.

If the assured, for the sake of a favourable market, or for other reason, puts an end to the risk at any place short of their destination, we agree with Mr. Phillips in thinking that the loss the goods may have sustained by sea damage should be adjusted upon the same principles as at the port of destination.²

Adjustment
under the me-
morandum.

In treating of the common memorandum, we have already had occasion to consider the mode of computing the degree of loss by sea damage on memorandum articles, so as to ascertain whether it amounts to the minimum percentage. It is perhaps hardly necessary to add that, in order to make the underwriter liable under this clause, it is not necessary that the direct loss sustained by the merchant should amount to this percentage on the prime cost or the sum insured, but only on the gross proceeds of the sound sales.³

¹ Stevens on Average, 81; and Appendix ii. 263—265. Benecke, Pr. of Indem. 444; 2 Phillips, no. 1480.

² 2 Phillips, Ins. no. 1467.

³ Mr. Phillips puts this case: Several articles are included in one invoice, all insured “free of average under 5 per cent.,” without discrimination of the different articles. How is the 5 per cent. to be computed? Suppose one of the articles to be sea-damaged, are the underwriters liable if the damage to this article is 5 per cent. of the sound value of the whole

invoice, or are they only liable where the amount of the damage, computed on the invoice value of the damaged article separately, is 5 per cent. of the whole invoice value of all the articles? He decides, and, as it seems, with reason, that the latter is the true mode of computation. 2 Phillips, no. 1752. *Secus*, if the policy were to be construed distributively, as in *Duff v. Mackenzie*, 3 C. B. N. S. 16, or *Wilkinson v. Hyde*, 3 id. 30.

Generally, as we have seen in the case of sea damage to goods under a valued policy, the valuation is the sole basis of adjustment, *i.e.* the underwriters are to pay the same percentage on the valuation in the policy, as the rate of depreciation amounts to on the sound sales; and this is so whenever, at the time of loss, the full cargo was on board to which the valuation was intended to apply. Where, however, only a part of the full intended cargo is on board at the time of loss, and such part is totally lost with the ship, the rule of adjustment on valued policies is, that the underwriters pay the same proportion of the valuation in the policy as the goods lost bear to the whole intended cargo;¹ in open policies they pay the proved value of the goods;² the rule would be the same, *mutatis mutandis*, if such part, after being shipped, arrived sea-damaged.

Adjustment where whole of intended cargo not on board at time of loss.

The following case shows the rule of adjustment on a continuing policy:—An insurance was effected for twelve months “on goods” on board thirty barges plying backwards and forwards between London and Birmingham for 12,000*l.*, “as interest might appear thereafter;” a particular average loss having been sustained by the sinking of one of these barges full of goods within the year, it was held that the underwriters were bound to pay such a proportion of the loss as 12,000*l.* bore to the whole value of goods at risk on board all the barges at the time of loss, and not such a proportion as 12,000*l.* might bear to the whole amount carried during the year.³

Adjustment on a continuing policy.

While the underwriter on goods (as is now the invariable practice) insures only their prime cost at the port of loading, the sole mode of adjustment that can be adopted is that which is founded on a comparison of the gross proceeds of the sound and damaged sales. But although, as between the

Proposed mode of insurance to secure a complete indemnity.

¹ *Tobin v. Harford*, 13 C. B. N. S. 651.
791; 32 L. J. (C. P.) 135; in error,

² *Crowley v. Cohen*, 3 B. & Ad. 478.
34 L. J. (C. P.) 37.

³ *Rickman v. Carstairs*, 5 B. & Ad.

assured and the underwriter, this is an equitable mode of adjustment, it is obvious that it by no means affords a perfect indemnity to the assured as a mercantile man. Indeed, as we have already seen, it does not profess to do so; its object being not to put the assured in the same condition as though his goods had come undamaged to a saving market, but solely to place him in the same condition he was in at the beginning of the risk.¹

That which the assured loses by the depreciation of his goods at the port of destination, is an aliquot part of their market price there, that being made up,—1, of their prime cost; 2, of freight, duty, and landing charges; 3, of profit or loss. That which the underwriter pays, is the same aliquot part of the prime cost alone; hence it is manifest that all loss incurred by items 2 and 3 must fall on the assured alone.

Mode proposed by Lord Ellenborough.

It has been suggested by Lord Ellenborough, that the assured, who desires a full indemnity in the case supposed, should either value his goods in the policy at their expected market price in the port of destination, including freight, &c., and expected profit, or else, "in an open policy, stipulate that, in case of loss, it shall be estimated according to the value" (*i. e.* market price) "of the goods at the port of delivery."²

To the objection made to this by Mr. Stevens, that the assured would thus be paying a premium on the whole amount of freight, duties, and expected profit, in order to insure against the contingent loss of part,³ the answer is, that provision may be made for a return of premium, in case either of total loss, where no freight is payable, or the loss on profit does not exceed a certain percentage.⁴

Proposed by Mr. Benecke.

To the same end it has been proposed that the different subjects of insurance should be valued separately in the policy. Thus, supposing a party desirous of insuring goods the prime cost of which is 2000*l.*, and upon which the freight will be, say,

¹ Stevens on Average, 96; Benecke, Pr. of Indem. 1—23.

³ Stevens on Average, 129.

⁴ Benecke, Pr. of Indem. 9.

² Usher v. Noble, 12 East, 639.

300%, the duty and landing charges 100%, expected profit 300%, then such goods should be insured for 2700%, and the meaning of the parties explained by the following clause:—"Of this 2700%, 2000% is on the goods, 300% on the freight, 100% on the duties and landing charges, and 300% on the expected profits at the port of destination."¹ In an open policy the intention of the parties may be thus expressed:—"Valued at so much as the gross proceeds of the goods will amount to at the port of discharge."²

This mode of insuring goods seems well deserving of the attention of the merchant who wishes to obtain full indemnity in cases of particular average loss.³

We come now to consider the adjustment of a particular average loss on ship. Adjustment
on Ship.

The sole basis on which particular average losses on the ship are adjusted is, under valued policies, the value in the policy, unless manifestly fraudulent;⁴ and under open policies, the value of the ship at the outset of the risk, *i. e.* what she is worth to her owner at the port where the voyage commences, including all her stores, outfit, and money advanced for seamen's wages, the whole covered with the premium and cost of the insurance.⁵

Where a ship is valued at different sums in two or more policies, we have seen that the only limit to the amount of claim is the value fixed by the policy put in suit, but the sum recoverable is liable to be diminished by the sum already recovered under other policies on the same risk for the same loss.⁶

¹ Benecke, *Pr. of Indem.* 25—29.

² *Ibid.* 7 and 8.

³ See the whole subject illustrated by a series of very ingenious calculations in Benecke, *Pr. of Indem.* 37—43. Mr. Chancellor Kent approves of the mode thus suggested, as the best method of adjustment; *Comm.* vol. iii. 336.

⁴ *Barker v. Janson*, L. R. 3 O. P. 303; *Shawe v. Felton*, 2 East, 109; *Haigh v. De la Cour*, 3 Camp. 319.

⁵ *Stevens on Average*, 190; Benecke, *Pr. of Indem.* 133.

⁶ *Ante*, p. 310; *Bruce v. Jones*, 1 H. & C. 769; *Bousfield v. Barnes*, 4 Camp. 228.

Rule of
adjustment.

The rule, therefore, for adjusting a particular average loss on the ship is very simple, viz., that, in open policies, the underwriter pays the same aliquot part of the sum he has agreed to insure as the damage, or the expense of repairing it, is of the ship's value at the commencement of the risk; in valued policies, he pays the same proportion of the valuation in the policy.¹ Thus, suppose in an open policy an underwriter has insured 1000*l.* on a ship, the insurable worth of which is proved to have been 2000*l.* at the outset of the risk. If a particular average loss takes place amounting to 500*l.*, as that sum is one fourth of 2000*l.*, the ship's insurable value at the outset, the underwriter pays the same proportionate amount, or one fourth of 1000*l.*, the sum he has insured, viz. 250*l.*²

The principal difficulty, therefore, in adjusting a particular average loss on ship, consists not in the rule of apportionment, but in ascertaining and fixing the amount of damage.

Rule of deducting one-third new for old.

If the damage done to the ship has not been repaired, the only mode of ascertaining its amount is by the estimate of surveyors. Where, however, the damage has been repaired the established mode of estimating its amount is, in case of wooden ships, to deduct one-third from the whole expense both of labour and materials which the repairs have cost, and to assess the damage at the remaining two-thirds. This is termed deducting one-third new for old, and it is done on the principle that, unless where the ship is quite new, the substitution of new work for old materials is a benefit to the shipowner, who gets the ship the better for repairs by the substitution of new work for old, and would consequently be a gainer if the whole expense of labour and repairs were regarded as so much pure loss to him. To avoid discussion in each particular case, the amount of deduction is fixed at one-third.³ In the case of iron ships, this rule of deduction is wholly inapplicable, and never resorted to.

¹ Benecke, *Pr. of Indem.* 460.

² This shows the policy of insuring ships, as nearly as may be, to their

full value, for the purposes of indemnity.

³ *Da Costa v. Newnham*, 2 T. R.

It is obvious, that if the ship be quite new, the reason for the rule would fail, and the rule itself consequently would not apply; accordingly, if it can be shown that this is the case, the deduction of one-third new for old will not be made.¹ It is a question, therefore, at what time the ship is so far to be regarded as a new ship, that the deduction shall not be made.

Limitations on the rule as to thirds.

In this country the general rule is, that a ship is to be so regarded only while she is on her first voyage. But what shall be considered to be her first voyage, is itself a question that has given rise to much controversy, and can hardly yet, perhaps, be considered as settled, as appears by the following cases.

Not applicable to ship on first voyage.

A ship, never at sea before, was insured on a voyage "from Bristol to New York, during her stay there, and back to the port of discharge;" the charter-party stipulating that the ship, after sailing outwards, was "to return to London, Liverpool, or Bristol, &c., and so end her intended voyage." The ship arrived at New York in safety, but, on her passage homeward from New York to Liverpool, got upon a shoal and was obliged to be repaired; upon a claim for these repairs, the sole question was whether the ship was on her first voyage or on her second when the loss took place, so as to be within the rule for deducting one-third new for old. Conflicting evidence of brokers and underwriters was led for the plaintiff and the defendant, and Lord Tenterden suggested to the jury that the charter-party and policy might fairly be taken into consideration for the sake of ascertaining whether the voyage out and home was all one adventure, as, upon the face of those instruments, his Lordship said, it appeared to be. The jury found for the plaintiff, saying that they considered it as all one voyage.²

Fenwick v. Robinson.

In the next case, a new ship was chartered for a voyage

Pirie v. Steele.

407; *Poingdestree v. Royal Exch. Ass. Co.*, Ryan & Moody, 378. Per Lord Tenterden in *Fenwick v. Robinson*, 3 C. & P. 324; *Stevens on Average*,

172; *Benecke, Pr. of Indem.* 457.

¹ *Stevens on Average*, 172.

² *Fenwick v. Robinson*, 3 C. & P. 323.

from London to Port Jackson and Van Diemen's Land with convicts, freight to be paid on her arrival there; and by the ship's articles it appeared that she was bound on a voyage from England to Van Diemen's Land, Australia, or any other (*sic*) port in India, till her arrival in England. The ship completed her outward voyage, but being unable to procure homeward freight from Van Diemen's Land, went in ballast to Madras, and took in freight for England, as was proved to be customary for ships so chartered. In the homeward passage from Madras she sustained injury whereby the same question was raised.

The evidence, as in the former action, was very contradictory, but the jury expressed themselves satisfied that the rule allowing a deduction of one-third did not apply under the circumstances, and found for the plaintiff.¹

Lord Abinger
rejected the
policy as
evidence.

Lord Abinger, before whom the case was tried, said that he could not accept the doctrine that the policy determined the point,² and at the same time approved of the practice of some insurance companies not to deduct thirds unless the ship be eighteen months old, as founded on a very sensible rule.³

Thompson v.
Hunter.

In a case tried on the Northern Circuit, under a policy effected in Dublin for a voyage from the Humber to the Baltic and back, a practice prevailing in the Humber, to consider all ships new for this purpose if built twelve months only, was set up, but Bayley, J., who tried the case, held that the Humber practice could not control the policy, being an Irish one. The plaintiff, however, seems to have recovered his full claim.⁴

These cases yield no general rule; indeed a general rule is hardly to be expected as the result of any number of cases upon such a subject. The question is determinate in but one point, the port of departure; in all its other elements

¹ Pirie v. Steele, 2 Mood. & Rob. 49; *S. C.* (more fully reported), 8 C. & P. 200.

² 8 C. & P. 204.

³ 8 C. & P. 202.

⁴ Thompson v. Hunter, cited 2 Mood. & Rob. 51.

it is at large, indefinitely capable of being varied, and consequently insusceptible of any general solution, except such as may be imposed by an arbitrary rule fixing a definite period of time.¹

An imaginary case of damage to the new repairs of an old ship, as not within this rule of deduction, may be dismissed as practically impossible.² In the next case to it, namely, where the damage falls chiefly on the new repairs, it is held that there is nothing to exclude the underwriter from his right of deducting thirds.³

Loss to new repairs.

If the ship, after repairs, never comes into the hands of the owner again, the reason for the rule obviously fails, as he never derives benefit from the superior value of the new over the old materials. The assured did not regain possession of his ship, through the fault of the underwriters in refusing to pay a bottomry bond for repairs incurred by their direction and at their expense, so that she was sold to satisfy the bond, and it was held that they were not entitled to deduct their thirds.⁴ In such case, if the default was that of the assured, the decision would have been different, and indeed was accordingly decided in favour of the right to deduction by Story, J., in the *United States*.⁵

Where ship never comes to hand.

Da Costa v. Newnham.

In respect of the ship's furniture and apparel, this rule of deduction varies: thus ironwork generally is subject to this deduction, but not anchors, as they are considered not to lose in value by being used.⁶ For chain cables the deduction is fixed at one-sixth.⁷ With regard to copper sheathing there seems no generally established practice; Mr. Benecke and Mr. Stevens both mention with approbation a rule of

No thirds for anchors.

Chain cables.

Copper sheathing.

¹ In the United States this exception of the "first voyage" is not recognized, but thirds are deducted, though the ship be new or on her first voyage: *Nichols v. Maine Fire and Mar. Ins. Co.*, 11 Day's R. 253; *Dunham v. Comm. Ins. Co.*, 11 Johnson's Rep. 215. See 3 Kent, Com. 339; 2 Phillips, no. 1431.

² See Stevens on Average, 172.

³ *Poingdestre v. Royal Ex. Ass. Co.*, Ryan & Mood. 378.

⁴ *Da Costa v. Newnham*, 2 T. R. 407.

⁵ *Humphrey v. Union Ins. Co.*, 3 Mason, R. 429.

⁶ Benecke, Pr. of Indem. 458.

⁷ Stevens on Average, 173.

one of the insurance associations, by which no deduction on copper sheathing is made in the first year, one-fifth in the second year, and so on, deducting one-fifth more for every succeeding year, till the completion of the five years; after which no part of the copper is made good.¹

Painting.

From what the one-third is deducted.

1. From the balance after deducting the old materials from the repairs.

In this country painting is always allowed in the average.

As the old materials thrown aside in making the repairs are always of some, and occasionally of considerable, value, it is important to ascertain whether the proceeds of such old materials are to be deducted from the gross expense of the repairs before or after deducting the one-third new for old. It has been decided in the United States, that the old materials should be applied towards the payment of the new, as far as they will go, and then to deduct the third from the balance.² And this seems to meet with the approval of Mr. Phillips, as the correct rule.³

In this country the practice is to deduct the value of the old materials from the net expense of the repairs, after having deducted the customary one-third.

2. That expense including labour and materials.

3. Incidental expenses.

The third is deducted not from the expense of the materials alone, but from that of the labour and materials conjointly.⁴

In Boston, U.S., incidental expenses directly connected with the repairs, such as dockage and wharfage, are added to the sum from which the deduction is made, with the approbation of Mr. Phillips.⁵ So, where part of the expense of repairs consisted of the marine interest on a bottomry bond, it was held in the Supreme Court of Massachusetts, that this was as subject to the deduction of one-third as the rest of the expenses, and, therefore, must be added to the sum from which the deduction is made.⁶

¹ Stevens on Average, 172, note (1); Benecke, Pr. of Indem. 458.

² Byrnes v. National Ins. Co., 1 Cowen, R. 265; American Ins. Co. v. Center, 4 Wendell's Rep. 5.

³ 2 Phillips Ins. no. 1434.

⁴ Benecke, Pr. of Indem. 458.

⁵ 2 Phillips, Ins. no. 1432.

⁶ Orrok v. Commonwealth Ins. Co., 18 Pickering's R. 151; *see contra*,—"In case of a partial loss, where money is taken up on bottomry, the underwriters have nothing to do with the bottomry bond, but are simply bound to pay the partial loss, including their share of the extra

Where repairs are necessarily done to a ship in a port of distress, and, as will frequently be the case, cost more there than if done in the home port, it has been made a question at what rate they should be paid for by the underwriters on ship,—at the rate of the port of distress, or of the home port.¹ The former appears unquestionably to be the true rule of adjustment, as the necessity of repairing the ship in the port of distress, which occasioned the increased expense, was an immediate consequence of one of the perils insured against; accordingly this is the rule adopted in practice in all cases of necessary repairs at a foreign port, the underwriter being of course entitled to deduct his thirds.²

Extra cost of repairs at port of distress is a charge on the underwriter.

In one case in the United States where full repairs might have been made abroad, but at an expense much greater than they would have cost at home, and the master chose to pursue his voyage with temporary repairs merely, the cost of such temporary repairs, and also the subsequent permanent repair rendered necessary after the ship's arrival in her home port, were both included in the particular average.³ Even though the underwriters refuse their assent to the repairs being done, in a particular way, yet the assured may, it seems, proceed with such repairs, and if necessary, and done properly, the underwriters will be liable.⁴

Where temporary repairs only are made at the foreign port.

Goods necessarily sold in a port of distress to defray the cost of repairing the ship, are to be paid for according to their clear value at the port of destination, and if they sold for a higher price than they would have fetched at this latter port, the freighter by properly claiming in the action may recover the larger sum.⁵

Cost of replacing goods sold for repair of ship is average.

expense of obtaining the money in that mode as a part of the loss," per Story, J., in *Bradlie v. Maryland Ins. Co.*, 12 Peter, Sup. C. R. 405, 400.

¹ 1 Magens, 54, and case xx. p. 255.

² Benecke, Pr. of Indem. 459—461.

³ *Brooks v. Oriental Ins. Co.*, 7

Pickering, 159.

⁴ *Walker v. Louisiana Ins. Co.*, 9 Martin, R. N. S. 276.

⁵ See *MacLachlan, Shipping*, 439, 373; *Atkinson v. Stephens*, 7 Exch. 567; *Richardson v. Nourse*, 3 B. & Ald. 237.

In adjusting a loss on ship by repairs thus defrayed from a sale of goods, the Supreme Court of Massachusetts held in favour of a deduction of thirds both from the cost of the repairs, and also from the difference between what the goods sold for in the port of distress, and that which they would have sold for in the port of destination.¹

Expense of
repairs
actually made
before total
loss.

If a ship have been actually repaired in a port of distress, and be afterwards totally lost before arriving at her port of destination, the cost of such repairs may be recovered cumulatively in addition to the total loss, either *quà* average, or, it has been said,² as money laid out and expended in labouring for the safeguard and recovery of the ship, under the general printed clause in the policy.³

But this rule applies only to repairs actually made; hence, where a ship put back twice in distress, and, on the first occasion, was actually re-coppered, but on the second occasion was only surveyed, and not repaired, and in the course of the survey some of her wales, &c., were necessarily removed, in order to examine her timbers, and never replaced, but sold, with the rest of the ship, as wreck, it was held that the cost of re-coppering might be recovered in addition to a total loss, but not the estimated expense of replacing the wales.⁴ If after a partial loss, unrepaired, the ship is totally lost, there is no right of recovery under the same policy, or under two or more policies for the same risk, except for the total loss;⁵ the less is there swallowed up of the greater and both form but one loss.⁶ But if the average loss unrepaired have occurred under one policy for one risk, and the subsequent total loss under another policy for a different risk, the assured is entitled to recover both.⁷ So if the ship be sold unrepaired

¹ *Orrok v. Commonwealth Ins. Co.*, 21 Pick. 456. Mr. Phillips does not approve of that decision, 2 Phillips, no. 1433.

² Per Lord Ellenborough, *Livie v. Jansen*, 12 East, 655.

³ *LeCheminant v. Pearson*, 4 Taunt. 367. The former is surely the proper mode of laying the claim; I should

not like to say the latter is wrong.

⁴ *Stewart v. Steele*, 11 L. J. N. S. (C. P.) 155; 5 Scott, N. R. 927.

⁵ *Livie v. Jansen*, 12 East, 648.

⁶ See per Lord Campbell in *Knight v. Faith*, 15 Q. B. 648, 668.

⁷ *Lidgett v. Secretan*, L. R. 6 C. P. 616.

after suffering an average loss, the assured is entitled to recover the loss under the policy.¹

In case the damage sustained by the ship were such that the expense of repairs would be greater than her value when repaired, although the assured might abandon upon due notice given and claim as for a constructive total loss, yet he is not bound to do so; he may repair her if he choose, and if he do, the same rule of adjustment applies. Repairing, a constructive loss.

A ship of the actual value of 3000*l.*, valued in the policy at 2600*l.*, upon which the defendants underwrote 1200*l.*, sustained such damage on her voyage that when towed into Queenstown harbour she was worth only 998*l.* without deducting salvage and general average. The owner chose to repair his vessel, and by means of a large outlay made her when repaired worth 7000*l.* From the insurers he claimed 100*per cent.*, and notwithstanding the argument at the bar that the assured would be making a large gain out of what was a mere contract of indemnity, by getting a vessel worth 7000*l.* instead of one that had been worth 3000*l.* only, it was held in all the three Courts that he was entitled to 100*per cent.*, *i.e.*, 1200*l.*, the full amount insured, but to no more in respect of the expense of repairs.² Another question in the case relating to the recovery of salvage and general average, in addition to the 100*per cent.*, under the sue and labour clause, has been already dealt with.³

On the other hand, if the ship after sustaining an average loss is sold by her owner unrepaired, the measure of what he is entitled to recover against the insurer is the estimated cost of repairs less the usual deduction, not exceeding the depreciation in value of the vessel as ascertained by the sale. Adjusting an average loss on ship sold unrepaired.

A ship valued in a time policy at 3700*l.*, was worth 4000*l.*

¹ *Knight v. Faith*, *supra*, and per Willes, J., in *Lidgett v. Secretan*, *supra*. 501; 3 Q. B. D. 558; *Aitchison v. Lohre*, 4 App. Ca. 755.

³ *Ante*, p. 792.

² *Lohre v. Aitchison*, 2 Q. B. D.

Pitman v.
Universal
Mar. Ins. Co.

at the time of her leaving Singapore for Moulmein, which was the commencement of the risk. When near to Moulmein she took the ground, and remained aground for four days in considerable danger; she was got off however, but with so much damage to the hull, that notice of abandonment was given to the insurer. This notice was not accepted but a request was made to the owner to repair; and he, after doing some trifling repairs, sold her, in effect, unrepaired for 3897*l*. He then claimed two-thirds of the amount of her estimated repairs, viz., 781*l*., from the insurer, who paid into Court 245*l*. including in that sum certain general average expenses; and the question was whether under the circumstances the assured was entitled to the estimated expense of the repairs although they had not been executed.

Lindley, J., before whom the case was tried, found that the sound value of the ship at Moulmein was 4000*l*., and held that the assured was entitled to the difference between the proceeds of the sale, less the actual repairs done, and the sound value of the ship, the same being applied to the value in the policy in determining the amount payable by the insurer. His decision was affirmed by Jessel, M. R., and by Cotton, L. J., *diss.* Brett, L. J., and the rule, in the terms stated above, very neatly ascertaining the limits of the insurer's liability, was formulated in the course of his judgment by Cotton, L. J.¹

It seems to me that this decision will be received as the established rule in all similar cases. The other view, which was supported in the judgment of Brett, L. J., rests on the assumed applicability of the ordinary rule, unmodified in form and extent, for the adjustment of a particular average on ship to the case at bar; but that rule in this unmodified degree, however commendable for the purpose of maintaining the ship as a going concern, seems to be exhausted with that purpose. When the owner of his own free choice transfers the ship for a sum of money, retaining the policy and a

¹ Pitman v. Universal Mar. Ins. Co., 9 Q. B. D. 192.

claim for an average loss in his own hands, he, who alone could do it, seems to have done that which has the effect of so altering the subsequent performance of the insurance contract, that the adjustment of a particular average is co-ordinated in principle with the adjustment of a salvage loss.¹

We have now to consider the adjustment of a loss on freight, profits, and the like.

Adjustment
on Freight,
Profits.

The rule for adjusting a partial loss on freight is very simple. Where the sum insured, or the valuation in the policy, is less than the value of the interest at risk, the underwriter pays the same proportional part of the loss, that the sum insured, or the valuation in the policy, is of the value of the freight: if the sum insured, or the valuation in the policy, equals the value of the interest, then he pays the whole of the loss.²

Rule.

Freight is generally insured in valued policies, and when it is so, the valuation in the policy is the basis, on which is calculated the amount of indemnity the underwriter has to pay. If in such case there be a partial loss of freight, the underwriter is only liable to pay upon such proportion of the value in the policy, as that part of the cargo for which freight would have been payable, but for the intervention of the perils insured against, bears to the full intended cargo.³

Rule for only
part of full
intended
cargo.

Under an open policy on freight, the underwriters can only be called upon to pay the actual amount of freight lost by reason of the intervention of the perils insured against,⁴ or a proportionate part of such amount.⁵

¹ See post, Pt. III. Chap. IX. 326.
Adjustment of salvage losses.

² 2 Phillips, Ins., no. 1454.

³ *Forbes v. Aspinall*, 13 East, 323; *Tobin v. Hartford*, 13 C. B. N. S. 791; 32 L. J. (C. P.) 134; in error, 34 L. J. (C. P.) 37.

⁴ *Forbes v. Cowie*, 1 Camp. 520. Per Lord Ellenborough in 13 East,

326.

⁵ *Denoon v. Home & Colonial Assur. Co.*, L. R. 7 C. P. 341. *Joyce v. Kennard*, L. R. 7 Q. B. 78, was a special policy binding the underwriters to pay the amount of the loss to the extent of their subscriptions, and not merely a proportionate part of it.

In fact, in such cases the underwriters, whether in a valued or open policy, adjust as for a total loss of a part of the freight, paying the same proportion of the sums for which they have subscribed the policy, as the freight lost bears to the full freight which would otherwise have been earned.

In open policies, adjustment is in gross.

In open policies on freight the loss by the general usage of Lloyd's is adjusted upon the gross, and not upon the net, proceeds of the freight at the port of destination; and this usage, though considered inconsistent with sound principle, has been sanctioned and acted upon by the Court of Common Pleas.¹

Freight where goods are sent on.

Where the original ship is disabled, and goods are sent on at a lower rate of freight, the loss thus occasioned is adjusted in the United States as a salvage loss, *i. e.*, the underwriter pays the whole amount of the insurance, and puts into his pocket the excess of the freight due under the charter-party over the expense of forwarding the goods.²

Under similar circumstances in this country the shipowner paid the expense of forwarding the goods, and recovered this expense from the insurers on freight by an action on the sue and labour clause of the policy.³

Adjustment on Profits where part of goods lost.

Where, as is frequently the case in the United States, it is agreed to adjust an average loss on profits at the same rate as on the goods out of which they are to arise, and the goods arrive sea-damaged, or part of them is totally lost, this is adjusted as an average loss on profits *pro tanto*; ⁴ and the rule there is the same, where part of the goods, owing to the decay produced by sea-damage, is necessarily sold, or thrown overboard in the course of the voyage.⁵

¹ Palmer v. Blackburn, 1 Bing. 61.

² 2 Phillips, Ins., no. 1441, citing Coffin v. Storer, 5 Mass. Rep. 252; Searle v. Scovell, 4 Johns. Ch. C. 218.

³ Kidston v. Empire Marine Ins. Co., L. R. 1 C. P. 535; (Ex. Ch.) 2 C. P. 357.

⁴ 2 Phillips, Ins., no. 1474.

⁵ Ibid.

CHAPTER VI.

DOCTRINE OF TOTAL LOSS AND OF ABANDONMENT AND ITS INCIDENTS.

Total and Constructive loss	- 951	Abandonment—time for notice -	960
distinguished - - -	- 951	accepted - - -	- 968
Abandonment - - -	- 953	revoked or waived - -	- 970
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by whom to be made - -	- 956	duties of master under - -	- 982
form of notice - - -	- 957	Aggregation of losses - -	- 985

A TOTAL loss, in Insurance Law, is one on account of which the assured is entitled to recover from the underwriter the whole amount of his subscription. It is either absolute or constructive. General doctrine of total and constructive loss.

An absolute total loss takes place when the subject insured wholly perishes, or there is a privation of it and its recovery is hopeless.¹ A constructive total loss takes place when the subject insured is not wholly destroyed, but its destruction is rendered highly probable, or the privation of it, though not quite irretrievable, is such that its recovery is either exceedingly doubtful or too expensive to be worth the attempt. How distinguished.

An absolute total loss entitles the assured to claim from the underwriter the whole amount of his subscription. A constructive total loss entitles him to make such claim, on condition of giving notice of abandonment of all right and title to any part of the property that may still exist or may still be recovered.

Whilst these things are thus distinguished and distinguishable, it is yet to be borne in mind that a constructive total

¹ La perte réelle, l'anéantissement assurées; Boulay-Paty on Emerigon, ou la privation effective des choses vol. ii. s. 217.

loss is as much a total loss in law as if the subject of insurance had been actually annihilated. A policy, therefore, against "total loss only," covers a constructive loss also, unless the parties, if they intend to exclude this, do so by some such words as "without benefit of abandonment."¹

Doctrine
stated by
Lord Abinger.

Total loss.

The practical distinction between cases of absolute and constructive total loss is very clearly illustrated in the following passages, from the judgment of Lord Abinger, in the leading case of *Roux v. Salvador*:—"The underwriter engages that the subject of insurance shall arrive in safety at its destined termination. If, in the progress of the voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured."

Circumstances
tending to a
constructive
total loss.

"But there are intermediate cases; there may be a capture which, though *primâ facie* a total loss, may be followed by a re-capture, which would revert the property in the assured. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship innavigable, without any hope of repair, or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them, or what remains of them, to their destination."

Election to
abandon.

"In all these, or any similar cases, if a prudent man, not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as that of the underwriter, treat the case as one of a total loss, and demand the full sum insured. But if he elects to do this, as the thing insured, or a portion of it, still exists, and is vested in him, the very principle of indem-

¹ *Adams v. McKenzie*, 32 L. J. (C. P.) 92.

nity requires that he should make a cession of all his right to the recovery of it, and that, too, within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value, and that he may, if he pleases, take measures, at his own cost, for releasing and increasing that value. In all these cases, not only the thing insured, or part of it, is supposed to exist *in specie*, but there is a possibility, however remote, of its arriving at its port of destination, or, at least, of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it."

"If the assured prefers the chance of any advantage that may result to him beyond the value of the thing insured, he is at liberty to do so; but he must also abide the risk of the arrival of the thing in such a state, as to entitle him to no more than a partial loss. If, in the event, the loss should become absolute, the underwriter is not less liable upon his contract, because the assured has used his own exertions to preserve the thing insured, or has postponed his claim, till that event of a total loss has become certain, which was uncertain before."¹

Consequence
of not abandon-
ing.

Abandonment, therefore, is the act of cession, by which in cases where the loss or destruction of the property, though not absolute, is highly imminent, or its recovery is too expensive to be worth the attempt, the assured, on condition of receiving at once the whole amount of the insurance, relinquishes to the underwriters all his property and interest in the thing insured, as far as it is covered by the policy, with all the claims that may ensue from its ownership, and all the profits that may arise from its recovery.²

Abandonment

¹ Per Lord Abinger in *Roux v. Salvador*, 3 Bing. N. C. 286, 287.

² Emerigon thus defines it: L'acte par lequel l'assuré quitte et délaisse

aux assureurs les droits, noms, raisons, et actions de propriété qu'il a en la chose assurée, c. xvii. vol. ii. p. 205. The earliest and best expo-

What it is that will justify an abandonment, in other words, what will amount to a constructive total loss, remains to be considered in a subsequent chapter: here we confine our attention to abandonment and its incidents.

Abandonment must be entire and absolute.

One of the first principles in this branch of insurance law is that an abandonment by the assured must be of his whole interest in the thing insured, in so far as that interest is covered by the policy. The extent of the interest, covered by the policy, determines the maximum quantity which the underwriter can claim to have transferred to him in case of abandonment. But for the assured, it is generally, if not always, an important question, how little he can abandon so as to serve his purposes, and satisfy the law. He can only accomplish this by discriminating in the policy the individual subjects of insurance upon which he is protecting his interest with the underwriter. And how to do this, so as to obtain his object, is the question.

For instance, if there be a single policy on ship and cargo jointly, without distinctly specifying how much is insured on each separately, Emerigon lays it down that neither the ship nor the cargo can be separately abandoned.¹ This also would be the law in case of different classes of merchandise constituting one cargo, and indiscriminately insured for one gross sum in the same policy.²

sition of the true nature of abandonment is to be found in *Le Guidon*, chap. vii. art. 1; and see the note thereon in 2 *Pardessus, des Lois Mar.* 400. The sum of the whole is conveyed in the sentence "*Le délaissement équipolle à un transport.*" In our law the operation of the Registry Acts prevents this as far as the ship is concerned. "The abandonment does not vest the property. The Registry Acts prevent this from passing, except in a certain way. The owners, however, become trus-

tees for the underwriters;" per Lord Truro, in the House of Lords, *Scottish Marine Ins. Co. v. Turner*, 1 *Maq. H. L. Rep.* 342, note. And see now the Merchant Shipping Act Amendment Act, 1862, 25 & 26 *Vict. c.* 63, s. 3.

¹ 2 *Emerigon, c. xvii. s. 8*, p. 250; *Mr. Phillips, no. 1659*, appears to favour the contrary view; the cases cited by him are of no value upon the point.

² *Est unica aasecuratio omnium mercium*, 2 *Emerigon, c. xvii. s. 8*,

If, however, a specific and distinct sum be insured on each article or kind of commodity in the policy,—as 1000*l.* on the sugars, and 1000*l.* on the indigoes,—each may be abandoned by itself;¹ and even where a distinct valuation was put upon each of the several articles or kinds, if one or more of these have not been at risk, the latter at least are not to be included in the abandonment.² Mr. Marshall has gone further, and has laid down what seems to be the law of this country,—that if the several kinds of commodities are each separately valued in the policy, they may each be separately abandoned, although a specific and distinct sum may not be insured upon each.³ In accordance with this opinion, it has been ruled in the United States under a policy on which one gross sum was insured “on 150 boxes of sugars valued at 6000*l.*, five hampers of mace valued at 5000*l.*, and four tons of logwood valued at 250*l.*,” that there may be a separate abandonment of each article.⁴

By Mr. Chancellor Kent the rule is stated in the following cautious terms,—“Unless the different sorts of cargo be so distinctly separated and considered in the policy, as to make it analogous to distinct insurances on distinct parcels, there cannot be a separate abandonment of part of the cargo insured.”⁵

If there be two separate policies on distinct parts of the same cargo, there may be an abandonment of either part separately, though both policies are effected with the same set of underwriters.⁶

p. 249. So in the United States; *Guerlain v. Columbian Ins. Co.*, 7 Johns. 527; 2 Phillips, Ins., no. 1660.

I am not aware that the question in any of its forms, discussed in this and other paragraphs immediately following, has come before our Courts; and unless the cases as to the recovery of an average loss upon memorandum articles bear some analogy, there is nothing in the reports to indicate the direction that decisions are likely to

take.

¹ 2 Emerigon, p. 249; 2 Phillips, Ins., no. 1660.

² *Amery v. Rodgers*, 1 Esp. 208.

³ 2 Marshall, Ins. 612.

⁴ *Deidericks v. Commercial Ins. Co. of New York*, 10 Johns. 234. Mr. Phillips (vol. ii. no. 1661), however, thinks that such an insurance is entire and that the abandonment should be of all the articles together.

⁵ Comm., vol. iii. 329.

⁶ 2 Emerigon, c. xvii. s. 13, p. 271.

Abandonment
operates only
to the extent
of the policy.

Abandonment, however, transfers the interest of the assured no further than that interest is covered by the policy.¹ So clearly is this the established rule, that if the underwriters demand an abandonment of more than is insured, this prevents not the assured from abandoning up to the extent of the sum insured, and, having done so, recovering as for a total loss.² But even to this extent it will not operate if part of the subject of insurance have not been at risk; there can be no abandonment and no claim as to things included in the policy, but not actually at risk at the time of the disaster.³

By whom to
be made.

"Every abandonment," to use the words of Valin, "must be pure and simple, and not conditional, otherwise it will not operate as a transfer of ownership, which is of the very essence of abandonment."⁴ It follows that no one is capable of making an abandonment, who has not at the time of the loss an absolute right of ownership in the subject insured. Consequently, one with whom the policy is deposited as security for a loan cannot give a valid notice of abandonment on behalf of the owner without his express authority.⁵ And so it is held in the United States, that the assured, after abandoning all his interest to one set of underwriters, cannot again make abandonment of the same interest to other underwriters.⁶ So, it is held there, that if the assured, by mortgaging his ship, has parted with the power of conveying an absolute title, he cannot abandon to the underwriters on ship, and he recovers only for the damage actually

Mortgagor.

¹ 4 Boulay-Paty, *Droit. Mar.* 286; Pothier, *d'Assurance*, no. 133.

² *Havelock v. Rockwood*, 8 T. R. 268. But such demand is no waiver of notice of abandonment, *ibid.*

³ 2 Emerigon, c. xvii. ss. 8, 250;

⁴ Boulay-Paty, *Droit Comm. Mar.* 289.

⁵ 2 Valin, liv. 3, tit. vi. des Assu-

rances, art. 60, p. 143; see also 2 Emerigon, c. xvii. s. 6, p. 231. And see Lord Truro's observations cited ante, p. 954, note.

⁶ *Jardine v. Leathley*, 32 L. J. (Q. B.) 132; 3 B. & S. 700.

⁷ *Higginson v. Dall*, 13 Mass. Rep. 96.

sustained, as a partial loss.¹ By the English statute the mortgagor remains owner and conveys an absolute title, subject, however, to all adverse rights appearing on the registry.²

But one part-owner having effected the insurance for all the others, has *prima facie* authority to give notice of abandonment for all; in such a case, however, it is a question of agency.³

Whether the consignee of a bill of lading has this right depends on whether he has thereby a right to the absolute and unconditional possession of the goods. The question was looked at by Lord Ellenborough in cases which arose out of the American embargo of 1807, but he gave no decision on the point.⁴

Consignee of
bill of lading.

No precise form is required for a notice of abandonment; it is not even necessary that it should be in writing,⁵ though, in point of fact, it generally is so. Whether given orally or in writing, it is an indispensable requisite, that it shall communicate unequivocally, and in plain terms, that the assured offers to abandon to the underwriters all his interest in the thing insured.

Notice of
abandonment.

Lord Ellenborough, indeed, went so far as to say, "The abandonment must be direct and express, and I think the word *abandon* should be used to make it effectual." In the case then before the Court the broker had communicated to the underwriters that the voyage had been broken up by the capture of the ship and cargo, and requested them to settle as for a total loss, and to give directions as to the disposal

Parmeter v.
Todhunter.

¹ *Gordon v. Massachusetts Fire & Marine Ins. Co.*, 2 Pickering's (Mass.) R. 249.

² *MacLachlan, Shipping*, 42.

³ *Hunt v. Roy. Exch. Ass. Co.*, 5 M. & Sel. 47.

⁴ *Conway v. Gray*, 10 East, 536.

⁵ *Parmeter v. Todhunter*, 1 Camp.

542; see also *Read v. Bonham*, 3 Brod. & B. 147. Lord Ellenborough considered that it would have been well to prevent oral notices of abandonment entirely, but admitted that in practice they were held to be operative.

of the ship and cargo—Lord Ellenborough held this not to be sufficient as a notice of abandonment.¹

*Currie v.
Bombay Na-
tive Ins. Co.*

The Privy Council, however, have disapproved of this decision, in a case in which the notice given was in these terms—"With regard to the *Northland*, we regret to say that she is a total wreck, and we have hereby to give you notice that we shall claim payment of the policies we hold against her cargo and disbursements." Counsel for the insurers, with the express approval of the Court, admitted upon argument that this notice was sufficient.²

*Thellusson v.
Fletcher.*

But where the broker showed the underwriter a letter from the assured, merely stating that the ship had been forced ashore, and a quantity of sugars damaged, and the underwriters thereupon desired that the assured would do the best he could for the damaged property, this was held by Lord Kenyon to be an insufficient notice of abandonment.³

*King v.
Walker.*

In a recent case, the letters of the captain, a part-owner, were shown as they arrived, by the other part-owners, to the underwriter, and among them, one stating his intention to abandon, and that he had abandoned the ship and had sold her; and, in a postscript, adding, "give the underwriters due notice," meaning, as the Court construed it, of abandonment; this was held to be sufficient notice of abandonment.⁴

Waiver.

If there be a demand on the insurers followed by payment as for a total loss, this is evidence at least of a waiver of a notice of abandonment.⁵

In the United States the Courts hold, that where the nature of the transaction is such as to leave no reasonable doubt of the intention of the assured to abandon, and of

¹ *Parmeter v. Todhunter*, 1 Camp. 542.

² *Currie v. Bombay Native Ins. Co.*, L. R. 3 P. C. 72.

³ *Thellusson v. Fletcher*, 1 Esp. 72.

⁴ *King v. Walker* (in error), 33 L. J. (Ex.) 325, reversing on this

point the judgment below, *ibid.* 167; 2 H. & C. 384; 3 id. 209.

⁵ *Houstman v. Thornton*, Holt's N. P. 242. See as to notice of dishonour in case of a bill of exchange, *Woods v. Dean*, 32 L. J. (Q. B.) 1; *Cordery v. Colville*, 32 L. J. (C. P.) 210.

that intention being understood by the underwriters, it shall be implied that a proper offer of abandonment has been made, though no formal notice can be proved to have been given.¹

The notice of abandonment ought to contain, or be accompanied with, a short statement of the grounds of abandonment, in order that the underwriters may determine whether to accept it or not; and in the United States the Courts have gone so far as to hold that the assured cannot avail himself of any other grounds of abandonment than those so stated.² There is no such decision in this country, and it seems unlikely that such a doctrine would be incorporated into English law.

The grounds of abandonment.

If notice of abandonment have been duly given, a deed of cession, or formal transfer, is unnecessary to enable the assured to perfect his abandonment, and recover as for a total loss. The notice is a complete transfer of property, in case it be accepted, or the loss in question continue total down to the time of action brought, except where the Registry Acts of Shipping interpose a barrier; and even then, the registered owner becomes immediately trustee for the underwriters.³

No deed of transfer requisite.

If there be nothing to abandon, abandonment would be a vain and useless form, and is not required in these circumstances by our law.⁴

Notice unnecessary where there is nothing to abandon.

¹ Thus, in the Supreme Court of the United States, a letter to the underwriters, containing a statement of the loss and subsequent sale of part of the property, and also a claim for the balance of the amount insured, less the salvage, was held to be a sufficient notice of abandonment; *Patapsco Ins. Co. v. Southgate*, 5 Peter's Sup. Court R. 604. So payments made upon a claim for a total loss have been held there to waive all defects in form of notice; *Watson v. Ins. Co. of North America*, 1

Binney's R. 47. So, the underwriters calling for papers to prove a total loss after claim made; *Galbraith v. Gracie*, *Condy's Marshall*, 388, n. See the cases collected in 2 Phillips, *Ins.*, no. 1678 *et seq.*

² See *Suydam v. Marine Ins. Co.*, in error, 2 Johnson, 138, and the other cases collected in 2 Phillips, *Ins.*, no. 1684.

³ See per Lord Truro, ante, p. 954, note.

⁴ See the law on this subject reviewed and stated by Lord Chelms-

Consequently, where a ship was chartered in this country to bring home a cargo from Calcutta to London, and a policy was effected on that homeward freight but upon the outward voyage from Clyde to New Zealand and thirty days after arrival there, and a constructive total loss of ship occurred during the currency of that policy, as the owner was not bound in these circumstances to repair his ship and did not do so, there was a total loss of the homeward freight, and nothing to abandon, so that notice of abandonment would have been unmeaning and was held unnecessary.¹ So, if the assured learn at the same time of the damage to ship or goods, and of their justifiable sale, there is then nothing which he can abandon, and a notice is unnecessary.²

On the contrary, abandonment must be resorted to and notice thereof must be given, if there be anything to abandon: "as, for instance, in the case of freight, where the cargo is already on board, and the shipowner would have the right of sending it on to its destination in another ship and so earning freight."³

Time within which notice of abandonment must be given.

It is obviously just that the assured, if he means to abandon and throw upon the underwriters the ownership of the thing insured, should give them notice of this intention within a reasonable time after receiving intelligence of the loss, in order that they may take immediate steps for turning the property thus cast upon their hands to the best account.⁴ The great practical difficulty, however, has been to lay down any rule as to the time which the assured shall be allowed for making up his own mind whether he will abandon.

ford, in *Rankin v. Potter*, L. R. 6 Ho. of Lds. (E. & I.) 83, 155, overruling Lord Campbell, in *Knight v. Faith*, 15 Q. B. 649; and see *Fleming v. Smith*, 2 Ho. of Lds. Cas. 183.

¹ *Rankin v. Potter*, *supra*.

² *Farnworth v. Hyde*, 18 C. B. N. S. 835; *Roux v. Salvador*, 3 Bing.

N. C. 266; *Mullett v. Shedden*, 13 East, 304; *Mellish v. Andrews*, 15 East, 15.

³ Per Cockburn, C. J., in *Potter v. Rankin* (coram Exch. Ch.), L. R. 5 C. P. 341, 371, 372.

⁴ Per Lord Abinger, in *Roux v. Salvador*, 3 Bing. N. C. 286.

According to the cases a reasonable time for this purpose depends in some degree upon the certainty of the news of the disaster, and upon the nature of the casualty itself. The time is dependent

First—If the intelligence be certain, and the disaster, such as capture, arrest, or detention, be one which is manifestly, *prima facie*, a constructive total loss while it continues, notice should be given immediately on receipt of the intelligence. on the intelligence being certain,

Secondly—If, on the other hand, the information be doubtful, or the casualty of such a description that it does not necessarily, and *per se*, give a right to abandon,—as in the case of the stranding or partial wreck of the ship, or the damage done by sea-water to perishable goods,—the assured may wait a reasonable time for more accurate information as to the nature of the loss, or the actual extent of the damage. and the nature of the casualty.

For these two purposes alone can any delay be allowed him. He may not delay in order to observe the state of the markets; neither can he lie by and treat the loss as an average loss until the recovery of the property becomes hopeless, and then give notice of abandonment.¹

The assured has an election to abandon or not. At what time this election is put upon him, being a question of fact, must depend on the circumstances of each case. As soon as it is put upon him by the reliable information furnished to him, he must determine promptly, because from and after that event his acts, his delay, the mere passing of time are accumulating as evidence against him of an election not to abandon, which the other side are entitled to hold binding upon him.

First.—Thus, in the case of an insurance on perishable goods, “free of average,” the ship was compelled to put back in distress, and, after two surveys, was condemned as irreparable; Lord Ellenborough held, that a notice of abandonment not given to the underwriters till five days after the assured Undue delay after certain intelligence.

¹ *Stringer v. Eng. & Soot. Mar. Ins. Co.*, L. R. 4 Q. B. 676; 5 id. 599; *Fleming v. Smith*, 1 H. L. Cas. 514; *Allwood v. Henckell*, 1 Park, Ins. 399, 400; *Potter v. Campbell*, 16 W. R. 399;

knew of the condemnation of the ship, was too late.¹ So, under a policy on ship, a delay of sixteen or seventeen days elapsed after the result of a final survey was known, before notice was given, and the notice was held too late.²

Again, where the owner of an East India ship, sold as irreparable at Calcutta, gave notice of abandonment three days after he had received the first accurate information of the loss, that was held sufficient, although it appeared that the captain of the ship had arrived in London, where the owner resided, ten days previously, and probably might, but was not proved to, have communicated to the owner, on his arrival, the facts of the loss.³

Fleming v.
Smith.

A ship having been compelled by sea-damage in May, 1842, to put into the Mauritius to refit, the master wrote to his owners, telling them of the injuries sustained, of the necessity for extensive repairs, of his intention to borrow money on bottomry, and of the sum required for that purpose. These letters were received at intervals between September and December, 1842. The owners wrote in answer to the master, expressing their surprise at the amount required, but approving of the course he proposed to take. On the 27th of March, 1843, the ship arrived, and was at first taken possession of on behalf of the owners. It being soon found, however, that the cost of repairs done was much in excess of her market value, the owners abandoned her on the 30th of March. It was held, that under the circumstances this abandonment was too late.⁴

A ship at the port of Saigon had become a constructive total loss, and one of her owners residing at Singapore, and possessing adequate authority to abandon, received certain intelligence of the ship's condition on the 7th February; after that date he ordered the master to have her sold, and then, on the 11th March following, notice of abandonment

¹ Hunt v. Royal Exch. Ass. Co., 5 147.
M. & Sel. 47.

² Aldridge v. Bell, 1 Stark. 498.

³ Read v. Bonham, 3 Br. & B.

⁴ Fleming v. Smith, 1 Ho. of Lds.
Cas. 513.

was given to the underwriters in London; it was held that notice of abandonment had not been given in due time.¹

It was laid down in that case that the telegraph ought to have been used immediately after the day on which the condition of the ship was definitely known, if a telegraph to Europe existed; and if there were no telegraph, then that notice should have been sent by the next post.²

From these cases, then, it appears that in this country the assured is bound to give notice of abandonment immediately on first receiving intelligence which is certain and definite, as, for instance, of capture, detention, or disability, without waiting to see the further issue of the casualty. If under such circumstances the assured elect to delay with a view to the advantage to be derived from recovery of the property and the completion of the contract of affreightment, he treats the loss already suffered as a partial loss, and cannot afterwards, under the same circumstances, abandon and claim for a total loss.

In a modern case, however, the judges both in the Court of Queen's Bench and on appeal, in the Court of Exchequer Chamber, seemed to think that there may arise such a change of circumstances as, without converting the partial into a total loss, would revive the right of abandonment and of giving notice accordingly. Even delay, as soon as it promises, contrary to expectation, to be indefinitely long, is mentioned as probably operating such a revival of the right.

Revival of the
right to give
notice.

The case in which these questions were agitated was this:—the plaintiffs, in 1863, had effected a policy with the defendants for 5000*l.* on goods valued at 11,500*l.*, by the *Dashing Wave*, from Liverpool to Matamoras; and during the continuance of the risk the ship was seized on the 5th November, 1863, by a United States cruiser and carried into New Orleans, where the cargo was libelled in the Prize Court as lawful prize. Instead of abandoning, as they

¹ *Kaltenbach v. Mackenzie*, 3 C. P. D. 467.

² *Ibid.* 477, 478.

might have done, on hearing of this casualty, the plaintiffs intervened in the suit. On the 16th June, 1864, the Court gave judgment against the captors and decreed restitution. On the 1st July, the captors appealed; the decree for restitution was suspended; and on the 12th of the following September, the plaintiffs gave defendants notice of abandonment, which was not accepted. From that time onwards, the defendants were kept informed by the plaintiffs of the events as they occurred, and were asked in December, 1864, and again in February, 1865, to give bail for the cargo, as otherwise it would be sold. The plaintiffs themselves refused to give bail under circumstances affecting the money currency of the United States such as made their refusal appear to the English judges not unreasonable, and on the 25th May, 1865, under an order of the Prize Court, the cargo was sold. Notice of abandonment to the defendants was thereupon renewed by the plaintiffs, who forthwith commenced their action on the policy. The judges appear to have thought that there might be, and in this case was, such a change of circumstances affecting the subject insured, as would revive the right to abandon, but being of opinion that the plaintiffs were justified by the circumstances in not putting in bail, the Court held that the sale by order of the Prize Court amounted in law to a total loss, rendering abandonment therefore unnecessary.¹

In the United States.

There is an absence of decision in the English books on this question as to the revival of the right to abandon, but in the United States the question appears to have frequently arisen and to have been decided, not only in cases of capture and detention, but in cases of stranding, submersion, and other disaster, in favour of such a revival of the right under an adequate change of circumstances affecting the subject insured; and this is now established law in that country.²

¹ *Stringer v. English, &c., Mar. Ins. Co.*, L. R. 4 Q. B. 676; *id.* 5 Q. B. 599. This case is cited with approval by Blackburn, J., before

the Lords in *Rankin v. Potter*, L. R. 6 H. of Lds. 116.

² 2 Phillips, Ins., nos. 1669, 1672.

Secondly—If the information received be indefinite, or the disaster of a nature that is inchoate, and such as may or may not be followed by more serious results, delay for further information is justifiable.¹ Thus, where some time was necessarily spent, after the ship's arrival, in ascertaining the state of a damaged cargo, the notice of abandonment was held to be not too late because postponed till after such survey was completed.²

Nature of the casualty.

But such postponement of notice being for the sake of investigating the real state of the damaged property, the right to delay ceases upon the accomplishment of that object.³ "Let it not be supposed," says Gibbs, C. J. (in the case just cited, of *Gernon v. Royal Exchange Company*), "that I accede to the proposition, that the assured may use this latitude as an opportunity to judge of the state of the markets, and, as the markets rise or fall, to elect whether he will abandon or not. He has no right to govern his conduct by any such rule; the only examination he may make is into the actual state of the cargo, to ascertain what is the degree of damage, without reference to the state of the market."⁴

Not the state of the market.

Thus, where the assured on goods, upon hearing that they had been sold under a Vice-Admiralty decree abroad for the benefit of whom it might concern, immediately sent out powers of attorney to remit the proceeds home; but four months afterwards, finding the sales less productive than he expected, gave notice of abandonment; this notice was held too late.⁵ So, where a ship laden with wheat was partially

¹ See the observations of the Privy Council in *Currie v. Bombay Native Ins. Co.*, L. R. 3 P. C. 79; and in *Browning v. Provincial Ins. Co. of Canada*, L. R. 5 P. C. 274, 275, although there made *alio intuitu*.

² *Gernon v. Roy. Exch. Ass. Co.*, 2 Marsh. R. 88; *S. C.* 6 Taunt. 381.

³ Per Dallas, C. J., in *Hudson v.*

Harrison, 3 Brod. & B. 106.

⁴ *Gernon v. Roy. Exch. Ass. Co.*, 6 Taunt. 387. The rule is the same in the United States; *Livermore v. Newburyport Marine Ins. Co.*, 1 Mass. R. 281.

⁵ *Allwood v. Henckell*, 1 Park. Ins. 399, 400.

sunk, and the assured, instead of abandoning immediately on receiving this intelligence, first employed themselves for nearly a month after the loss in getting out the wheat on their own account, and then, when nearly the whole of it was got out, on finding it more damaged than they expected, gave notice of abandonment; Lord Ellenborough and the whole Court held the notice too late.¹

A ship laden with sugar, and bound for London, was captured and finally taken into Charleston where the sugar was sold and the proceeds lodged in the hands of a person resident in Charleston. From the state of political affairs at that time, sugar was dear at Charleston, and as Lord Abinger conjectured, the sugar had come to a very good market, and the assured was satisfied and took to the proceeds. A year afterwards the person in whose hands the money had been lodged, became insolvent, and after that it was, with obvious justice, held that it was too late to come upon the underwriters for a total loss.²

Upon the same principle, where the voyage is delayed or broken up but the property saved, the owner must give notice of abandonment in the first instance, and cannot first wait to see whether he can prosecute the adventure, and then elect to abandon when he finds that he cannot. Hence, where a ship, in which oil had been insured "from New York to Havre," was carried into a British port and kept there till Havre was declared by the British government in a state of blockade, a notice of abandonment was held too late which was not given till five weeks after the notification of the blockade—"the latest event," Lord Ellenborough said, "to which the loss that gave the right to abandon was capable of being referred."³

A question of a very mixed description arose out of the facts respecting the *Sir W. Eyre*.⁴ She had sailed from

¹ *Anderson v. Royal Exch. Ass. Co.*, 7 East, 38; and see *Fleming v. Smith*, 1 H. Lds. Cas. 513.

² *Mitchell v. Edie*, 1 T. R. 608, as

cited per Blackburn, J., in *Rankin v. Potter*, L. R. 6 H. of Lds. 120.

³ *Barker v. Blakes*, 9 East, 283.

⁴ *Potter v. Campbell*, 16 W. R. 401.

Greenock for Dunedin in New Zealand, and touched, by permission, at Bluff harbour, where she grounded, and was got off after a time, not without difficulty, and, it was feared, considerable damage. She then proceeded to Dunedin and was surveyed there as far as was possible where there was neither slip nor dry dock, and as it could not be ascertained what injury had been done to her, she was temporarily repaired, and would thereupon have prosecuted her voyage to Calcutta had not the master been without funds to meet his expenses amounting to 1000*l.* at Dunedin. Quite half of that amount was owing to default of the owner or master under the Passenger Acts. The ship after being detained for nine months waiting for remittances from Europe, at length sailed for Calcutta. Upon her arrival there her injuries were ascertained to be such and the expense of repairing her so great, that the master was entirely justified in giving notice of abandonment to the underwriters. But now, whether it was still open to him to give such notice was the question which the Court determined in the negative.

Willes, J., in delivering the judgment of the Court of Common Pleas, says, "We admit that this is not a question of hours or even of days, but whether there was substantial delay out of the ordinary course of maritime affairs. We do not go on the mere lapse of time, we must look for something more substantial, in order to see whether the delay will excuse the underwriters. I think the argument may very well be stated as one which recommends itself by its equity, that not only all the reasonable incidents of maritime adventure may be taken into account in determining the question of what is reasonable time, but also that you may, in each particular case against the underwriters, take into account all the consequences that flow from the damage upon which the question arises. . . . She was detained at Dunedin for nine months, in respect of disbursements of upwards of 1000*l.*, only one-half of which is imputed to the account of the underwriters; of the rest a great proportion was to be traced to the default of the owner or master; for example,

penalties for breaches of the English Act, percentage of passage money ordered to be returned, and the like. The delay was for the want of money to meet these disbursements. It seems impossible to arrive safely at the conclusion that the ship would have been detained nine months in New Zealand if she had only been burthened with her ordinary expenses and the expenses caused by the damage. But for the expenses incurred by default of her owner or master she would probably have sailed for Calcutta months before." On these considerations the Court held that the notice of abandonment given after her arrival at Calcutta and the ascertainment there of her injuries, came too late.¹

An abandonment once accepted is irrevocable.

The law of England agrees with that of France and the United States in holding that a notice of abandonment once accepted by the underwriters is irrevocable, unless made under a mistake of fact. So that in the case of *Smith v. Robertson*, after such acceptance, the restoration of the ship, before action brought, was held not to defeat the right of the assured to recover for a total loss in respect of such notice.²

What constitutes an acceptance.

In considering what will amount to an acceptance, it is first to be observed that in England there is no established form in which it must be conveyed; any verbal or written assent, from which it may be distinctly inferred that the underwriters intended to adopt the abandonment, is a sufficient acceptance. The evidence, however, must distinctly show their acquiescence; but a request that the assured would do the best they could with the damaged property is held not to be an acceptance,³ nor is mere silence on receipt of the notice; for as Story, J., remarks, "they are

¹ Accord. per Blackburn, J., as to this case in *Rankin v. Potter*, L. R. 6 H. of Lds. 117, 119, 123.

² *Smith v. Robertson*, 2 Dow's P. C. 474; see also *Hudson v. Harrison*, 3 Brod. & B. 153. The effect of an acceptance is well expressed by

Boulay-Paty; "Par leur acceptation volontaire, il s'est fait un pacte entre les parties qui a tout terminé." ⁴ *Boulay-Paty*, Droit Mar. 380.

³ *Thellusson v. Fletcher*, 1 Esp. 72.

not bound to signify their acceptance: if they say and do nothing, the proper conclusion is, that they do not mean to accept."¹

Yet it is not necessary that the underwriter should express his assent to the abandonment in words; his acceptance may be inferred from his acts, when they are such as naturally would lead the assured to infer that the abandonment is acquiesced in, and to act accordingly.

To be inferred from acts, without words.

Therefore, where the insurers, upon notice of abandonment received by them, took possession of the wrecked vessel, brought her away, did repairs upon her, and kept her in their possession for some time, until she was sold under a claim of salvage, this was held to be clear evidence of acceptance of the abandonment, whereby they had waived a breach of warranty, and made themselves liable for the loss.² In short, whenever the underwriters, after receiving notice of abandonment, do any act in consequence thereof, which could be justified only under a right derived from it, and without giving any notice of their object, such act has been held in the United States, and it seems would be held in this country, to be itself decisive evidence of an acceptance.³

Consequently, it is not to be expected that there should be any fixed rule in England as to the time within which an acceptance should be made. Lord Eldon, indeed, in *Smith v. Robertson*, seemed to consider that, as the assured was bound to make his election at once to abandon, there was "a corresponding obligation" on the part of the underwriter, "to accede to the abandonment *de presenti*,"⁴ "evidently showing," says Park, J., "that he thought the

Time for accepting.

¹ Per Story, J., in *Peele v. Merchants' Ins. Co.*, 3 Mason's R. 27.

² Provincial Ins. Co. of Canada v. Leduc, L. R. 6 P. C. 224. See per Lord Penzance, *Shepherd v. Henderson*, 7 App. C. 49, 64.

³ Per Story, J., in *Peele v. Merchants' Ins. Co.*, 3 Mason's Rep. 27;

Cincinnati Ins. Co. v. Bakewell, 4 B. Munroe's R. (Ken.) 541; and see cases cited in 2 Phillips, Ins., no. 1693; *Provincial Ins. Co. of Canada v. Leduc*, *supra*.

⁴ In *Smith v. Robertson*, 2 Dow, 479.

underwriter should say, at the earliest opportunity, whether he will accept the abandonment or not."¹

Accordingly, by the Court of which Park, J., was a member, the silence of the insurers for two months after receipt of notice of abandonment, was held to amount to acquiescence in it.²

But in practice no such obligation is recognized between assured and insurer, as being upon the latter in respect of notice of abandonment. And recently the Privy Council have recognized the opinion of Story, J., which has been cited above,³ as being the rule of law in this country—that the insurers are not bound to signify this acceptance; and that if they say and do nothing, the proper conclusion is that they do not mean to accept.⁴

Revocation or
defeasance of
notice of
abandonment.

A notice of abandonment, once accepted, is irrevocable, except by the mutual consent of the parties; if not accepted, it is defeasible, *e.g.*, by the subsequent restoration of the property before action brought,⁵ or by acts on the part of the assured, clearly showing that he himself waives his right to insist on it, by treating the loss as partial, and not total.

Inferred from
acts of master.

No waiver, however, can be inferred from any acts done by the master, while acting as agent of both parties, and for the benefit of all concerned, in attempting to recover or repair the damaged property. But if the master appears to have been acting, not as the agent of both parties and for the benefit of all concerned, but under the directions and for the benefit of the assured exclusively,⁶—or if the acts and interference of the assured with the use and management of the subject insured be such as manifestly to show that he

Or of the
assured.

¹ Per Park, J., in *Hudson v. Harrison*, 3 Brod. & B. 108.

² *Hudson v. Harrison*, *supra*.

³ *Ante*, p. 968.

⁴ *Provincial Ins. Co. of Canada v. Leduc*, L. R. 6 P. C. 224, 237.

⁵ *Cologan v. London Ass. Co.*, 5

M. & Sel. 447.

⁶ This was done in *Fleming v. Smith*, 1 H. of Lds. Cas. 513, before giving notice of abandonment, and thereby and by the lapse of time was the assured's right to abandon defeated.

intended to act for his own interest as owner, and not for the benefit of the underwriters, there appears little doubt that such acts and interference would operate as a waiver of his notice of abandonment.¹

Such dealings, however, of the master or of the assured with the abandoned property, to have this effect, must unequivocally amount to acts of ownership. Thus where, on receiving intelligence that their ship and cargo had been carried by a mutinous crew into Barbadoes, and that the government agent there had sold the cargo, but not the ship, the assured in this country immediately gave notice of abandonment, and then wrote to the agent at Barbadoes, directing him to sell the ship also, and remit the proceeds of the sale both of ship and cargo to England, "as otherwise, they (the assured) could not settle with the underwriters." This was held in the House of Lords not to be a waiver of the previous notice of abandonment.²

So, where a ship was brought into her home port in such a disabled state, that she was a mere congeries of planks, and being, on survey, found irreparable, except at a cost which would have exceeded her repaired value, was sold by the assured, after notice of abandonment, without the concurrence of the underwriters: this seems to have been admitted not to be a waiver of the abandonment.³

So, in the United States, where the assured, after the underwriters had refused to accept a notice of abandonment made on good grounds, sold the ship under circumstances that justified the sale, not for his own benefit, but for that of all concerned, this was held to be no waiver of his notice.⁴ Where, on the contrary, he sold her for his own benefit, this was considered as a clear case of waiver;⁵ so, where he

¹ So decided in the United States in *Columbian Ins. Co. v. Ashby and Stribling*, 4 Peter's Sup. Court Rep. 139.

² *Brown v. Smith*, 1 Dow, P. C. 349.

³ *Allen v. Sugrue, Dans. & Ll.*

190, note (a); and see *Stewart v. Greenock Mar. Ins. Co.*, 2 H. L. Cas. 159.

⁴ *Walden v. Phoenix Ins. Co.*, 5 Johnson (New York), Rep. 510.

⁵ *Abbot v. Sebor*, 2 Johnson C. 45; see 2 Phillips, Ins., no. 1699 *et seq.*

bought her in at the sale, and then despatched her on another voyage.¹ In one American case, *Story, J.*, laid it down, that if the assured, after notice of abandonment, were to proceed to repair the ship without consulting the underwriters, that would be a waiver of the notice; for the reasonable inference would be, that the assured, in such case, was repairing her for his own benefit.² The same point was decided in the Supreme Court of Error in New York, where a master, acting as agent for the owners, repaired at the Isle of France a ship which had been abandoned by the assured at New York on first hearing of the casualty.³

May the underwriter repair and restore so as to defeat abandonment?

The insurers may, in the opinion of Valin, repair the ship notwithstanding notice of abandonment, and compel the assured to receive her back, provided they have not voluntarily settled as for a total loss, and have acted, in repairing the ship, under protest against the validity of the abandonment.⁴ Emerigon denies this position,⁵ and the Code de Commerce sanctions his doctrine.⁶

According to Phillips it appears that the prevailing doctrine in the United States is against any such right of the insurer,⁷ but that in this respect Massachusetts is an exception to the other States.⁸ It is to be noted that both in France and the United States, an abandonment validly made is indefeasible by subsequent events.⁹ In this country an abandonment is not indefeasible until action brought. Till that event, therefore, the loss though at one time total is

¹ *Ogden v. N. Y. Firemen's Ins. Co.*, 10 Johnson, R. 177; and *S. C.*, in error, 12 *ibid.* 25.

² See *Peele v. Merchants' Ins. Co.*, 3 Mason's Rep. 27.

³ *Dickey v. American Ins. Co.*, 3 Wend. 658, cited 2 Phillips, Ins., no. 1701. The learned author adds "by repairing, the loss ceases to be a total one. Making an abandonment, and proceeding, at the same time, to repair, involves an inconsistency, since by the abandonment the assured de-

clares the ship to belong to the underwriter, and by repairing any further than merely to preserve the ship from destruction he makes it his own."

⁴ 2 Valin, Comm., liv. iii. tit. vi. *des Assurances*, art. 60, p. 144.

⁵ Emerigon, c. xvii. s. 6, p. 231.

⁶ Art. 385.

⁷ 2 Phillips, Ins., no. 1706.

⁸ *Ibid.* no. 1558.

⁹ Co. de Com. 385; 2 Phillips, Ins., no. 1705.

liable to be reduced to a partial loss, by the restitution of the property insured under such circumstances in this country, that the assured may, if he please, have possession, and may reasonably be expected to take it.¹

The effect of a valid abandonment is to transfer the whole interest in what remains of the thing insured, so far as it is covered by the policy, together with all the rights and liabilities arising out of its ownership, from the assured to the underwriters in proportion to the amount of their several subscriptions.² This transfer, according to what seems to be the true principle, is retrospective, operating from the moment of the casualty which gave the right to abandon.³ There are losses as to which the doctrine is more properly expressed, by saying that the insurer is by abandonment subrogated, upon payment, into the rights of the assured.⁴

Valid abandonment transfers the ownership.

From the moment of the casualty.

¹ Per Bayley, J., *Holdsworth v. Wise*, 7 B. & C. 794, 799; per Lord Campbell, *Dean v. Hornby*, 3 E. & B. 180.

² Le délaissement équipolle à un transport. (Le Guidon, cap. vii.) Etre translatif de propriété est de l'essence du délaissement. (2 Valin, liv. iii. tit. vi. *des Assurances*, art. 60, p. 144; 2 Emerigon, c. xvii. s. 6, p. 130; 4 Boulay-Paty, Mar. 375.) L'assuré quitte et délaisse aux assureurs ses droits, noms, raisons, et actions qu'il a en la marchandise chargée. (Le Guidon, ubi supra.) L'assureur est subrogé à tous les droits de l'assuré, car, en acquérant la chose, il acquiert aussi tous les accessoires. (3 Pardessus, *Droit Com.* 426.) As far as abandonment of ship in this country is concerned, the generality of this doctrine must be regarded as controlled by the operation of the Registry Acts: per Lord Truro, 1 Macqueen's H. L. Cas. 342. See ante, p. 954, note.

³ Emerigon goes further, and lays

it down that abandonment operates as a transfer of the whole interest of the assured to the underwriter, not only from the moment of the loss, but from the commencement of the risk (dès le principe, c. xvii. s. 6, p. 232, and s. 9, p. 255). The Code de Commerce (art. 385) declares that the salvage vests in the underwriters from the period of the abandonment (de l'époque du délaissement), which Boulay-Paty explains as meaning from the time at which notice of abandonment is given (dès le moment de la signification). (*Droit Mar.*, tom. iv. p. 377.) In the United States it is conclusively settled that the moment of the loss, and not the commencement of the risk, is the time from which the transfer takes effect; *Coolidge v. Gloucester Marine Ins. Co.*, 15 Pickering's Rep. 346, cited 2 Phillips, Ins., no. 1708. In English law the same rule holds good.

⁴ See the observations of the Court of Exch. Ch. in *Potter v. Rankin*, L. R. 5 C. P. 341.

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A salvage loss.

The thing insured when thus transferred by abandonment to the underwriter is called the salvage, and the losses, which give the right of abandonment, salvage losses or total losses with benefit of salvage. The effect of abandonment is not only to transfer the remains of the abandoned property, but also to clothe the underwriter from the moment of loss with all the rights and all the responsibility of ownership.

Rights of ownership transferred.

Upon this principle it has been decided, that where underwriters had paid a total loss on British ships captured by the Spaniards, they were entitled to the proceeds of Spanish ships captured by way of reprisals, and distributed by the British government amongst the assured.¹ Lord Blackburn justly objects to calling the money so distributed by the name of *salvage*, for it in no way satisfies that designation; he prefers to say that it was a diminution of the loss, and thereby became a right of the insurers who had paid the full loss. In the case before the House of Lords which gave occasion to this observation, the distribution of money was in virtue of an Act of the United States Congress expressly to supplement the payments made by insurers to those who had suffered in excess of the payments so made. The insurers were therefore held not to be entitled to recover from the assured the money so distributed.²

The insurer on ship becomes by abandonment of the ship entitled to the pending freight in case it be earned by the ship abandoned;³ but if the master on occasion of the loss tranships the cargo, and by so performing his contract to carry earns the freight, no title to that freight accrues to the abandonee of the damaged ship.⁴ If no freight is being earned at the time of abandonment, no title of that kind passes to the insurer by the abandonment. For instance,

¹ *Randal v. Cockran*, 1 Ves. 98; *Blaaupot v. Da Costa*, 1 Eden, 130. See also in the United States the *S. P. in Gracie v. New York Ins. Co.*, 8 Johnson, N. Y. R. 183.

² *Burnand v. Rodocanachi*, 7 App.

C. 333, 340, 341; 6 Q. B. D. 633.

³ *Stewart v. Greenock Mar. Ins. Co.*, 2 H. of Lds. Cas. 159; *Davidson v. Case*, 5 M. & Sel. 79.

⁴ *Hickie v. Rodocanachi*, 28 L. J. (Ex.) 273.

the cargo on board may belong to the owner of the ship, and anything recoverable in such a case must be merely for the subsequent use of the ship from the time of the loss.¹ This ship may be under charter to load a cargo at a subsequent port, and if she is disabled by collision before reaching it, such chartered freight is a loss to the owners but not to the insurer on ship. The insurer, however, is entitled to recover against the ship in fault for damage to ship, and the owners for the loss of the chartered freight.²

In one case a ship, valued in the policy at 6000*l.*, and insured for the same amount, was totally lost by collision; the owners who had been paid the full amount of the insurance recovered against the ship in fault damages proportioned to a ship of the value of 8000*l.*, the real value of the lost ship to her owners; but in consequence of the valuation in the policy it was held that the insurers were entitled to the whole amount of the damages.³ That decision has since been doubted in the House of Lords.⁴ A ship was damaged by collision with another ship, both ships being the property of the same owner, and the insurers, after paying under the policy, sued the owner and failed, because the assured owner could not have a right of action against himself, and the insurers could sue in no other right.⁵

In the United States, where the assured, before abandonment, had a right to claim a general average contribution, such claim was held to have been transferred by the abandonment to the underwriters.⁶

The underwriter, by not accepting the abandonment, or by other acts of the like kind, may lose all title to the ultimate benefit of salvage. A British ship and cargo were captured

Title to salvage waived.

¹ *Miller v. Woodfall*, 8 E. & B. 493; 27 L. J. (Q. B.) 120. See *Brown v. North*, 8 Exch. 1.

² *Sea Ins. Co. v. Hadden*, 13 Q. B. D. 706, C. A.; *Yates v. Whyte*, 4 Bing. N. C. 272.

³ *North of England Iron SS. Ins. Co. v. Armstrong*, L. R. 5 Q. B.

244.

⁴ Per Lord Blackburn, *Burnand v. Rodocanachi*, 7 App. C. 333, 342.

⁵ *Simpson v. Thompson*, 3 App. C. 279.

⁶ *Walker v. United States Ins. Co.*, 11 Serg. & Rawle, 61.

by the Brazilian government, and condemned as prize for breach of blockade. The underwriters who had insured the cargo would not accept an abandonment, but compromised the claim for 35 per cent. Some time afterwards restitution and compensation were made by the Brazilian government, and in an action by the insurers to obtain the benefit of this, the Court held that they were not entitled to anything.¹

Liabilities of
ownership
transferred.

As the abandonment thus vests in the underwriter all the privileges, so it throws upon him all the liabilities of ownership, for instance, the liability to pay salvage reward to third parties for saving the property, all liens to which the property is subject, such as for seamen's wages, and all other ordinary and extra expenses of earning the pending freight.²

In the United States a vessel was purchased and insured at her full value, the assured being ignorant of the existence of a bottomry lien on the ship at the time of purchase; afterwards she was abandoned to the insurer under a constructive total loss, and was then seized for the amount of the lien. In the action by the assured against the insurer, the Court gave judgment only for so much as the value of the ship when purchased exceeded the amount of the lien at that time upon her, since that was the measure of the insurable interest of the assured.³

Is the aban-
donee of cargo
liable for
freight?

It is a question whether, upon abandonment to the underwriter on goods, the abandonee takes the salvage subject to the shipowner's claim for freight; and if so, whether it be the full freight, or freight *pro rata* in case of their acceptance by the merchant at a port of distress.

In this country it was long ago decided, in the case of *Baillie v. Moudigliani*, and is undoubtedly established as the general rule, that the assured cannot in such cases throw the

¹ *Brooks v. M'Donnell*, 1 Y. & C. 502; *Blaaupot v. Da Costa*, 1 Eden, 130.

Barclay v. Stirling, 5 M. & Sel. 6; *Davidson v. Case*, 5 id. 79.

³ *Williams v. Smith*, 2 Caine, R.

² *Sharp v. Gladstone*, 7 East, 24;

13; 2 Phillips, Ins., no. 1716.

loss on freight upon the underwriters on goods, and this on the plain principle, that they have not, by the terms of their contract, engaged to indemnify him against it.¹

But as the effect of an abandonment is to subrogate the insurer into the rights and liabilities of the assured, the insurer cannot take to the subject abandoned without thereby drawing upon himself the legal liability as owner of the goods to whatever freight may at the time be payable in respect of them.²

In the Supreme Court of the United States, it was held, indeed, that the claim for freight against the abandonnee could not be supported, and that, if the underwriters on goods had been obliged to pay freight in such case to the shipowner, in order to obtain possession of the salvage, they might either deduct the amount so paid from the loss, or, if a total loss had been previously settled, recover it from the assured as money paid to his use.³ Johnson, J., at the same time dissented, on the ground that at the moment of abandonment, the time, that is, of the loss, no freight had been earned. Mr. Phillips, notwithstanding this decision, is of opinion that the charge ought to fall on the abandonnee of the goods, on the ground that he is the party who, as owner of the salvage, alone derives benefit from their transportation.⁴

In the United States.

Mr. Phillips raises the question, whether in such cases, supposing the freight to exceed the worth of the salvage, the abandonnee of goods is bound to take to the salvage, and states his opinion, that, under the circumstances supposed, the underwriter on goods might pay a total loss, and decline taking to the salvage, provided he gave speedy notice of his intention so to do.⁵ This opinion of that learned text writer seems to accord with what must be deemed to be the principles of our law bearing upon the point.

Can the underwriter decline taking to the salvage?

¹ Baillie v. Moudigliani, 1 Park, Ins. 116.

² Dakin v. Oxley, 33 L. J. (C. P.) 116. Qui sentit commodum, sentire debet et onus.

³ Columbian Ins. Co. v. Catlett, 12 Wheaton Rep. 383, cited 2 Phillips, Ins., no. 1718.

⁴ 2 Phillips, ubi supra.

⁵ 2 Phillips, Ins., no. 1726.

Is always entitled to claim salvage.

Hitherto we have spoken solely of the effects of an abandonment, and confined our attention to "salvage losses," as they are called, "with benefit of abandonment." But even in the absence of abandonment, if a total loss has taken place, the rule applies,—the underwriter who pays a total loss is entitled to the benefit of any salvage that may ultimately come to hand, or the proceeds of any sale of the property made by the assured, or his agent acting for all concerned. Thus, in the case of a missing ship, where there had been no abandonment, Gibbs, C. J., said, that "the underwriters, on payment of a total loss, would of course be entitled to the ship, if she afterwards turned up, as salvage."¹ So, in the case of "sea-damaged cargo sold at an intermediate port, as Lord Abinger stated it, the net amount of the sale after deducting the charges, becomes money had and received to the use of the underwriter upon payment by him of a total loss."² And so per Lord Hardwicke, in reference to the question who was entitled to the proceeds of Spanish ships captured by way of reprisals,—“the person who originally sustains the loss was the owner, but after satisfaction made to him, the insurer.”³

If, however, after adjustment and payment for a total loss, the whole of the thing insured be recovered (as where a box of bullion was fished up and restored after its full insured value had been paid), the underwriter will not, on that account, be entitled to reclaim from the assured the whole amount of his subscription, but merely the thing saved, or its value after deducting the expense of saving it.⁴

The same principle applies, where, after the underwriter has paid not a total loss, but a certain percentage (say 50 per cent.) of his subscription, a corresponding aliquot part of the proceeds of the thing insured is restored to the assured (say a half) whereby the receipts of the assured exceed the

¹ *Houstman v. Thornton*, Holt's N. P. 242.

² *Roux v. Salvador*, 3 Bing. N. C. 266, 288.

³ *Randal v. Cockran*, 1 Ves. 98;

and per Blackburn, J., in *Rankin v. Potter*, L. R. 6 H. of Lds. 118, 130. See *Burnand v. Rodocanachi*, 7 App. C. 333.

⁴ *Da Costa v. Firth*, 4 Burr. 1966.

whole amount of the insurance: the underwriter is not, on that account, entitled to recover back any part of the percentage he has paid, for there remains a total loss of 50 per cent., and as Gibbs, C.J., expresses it, although the assured cannot recover, as against the underwriter, more than the amount of his subscription, there is no rule to prevent him from recovering more *undequâque*.¹

Upon abandonment the underwriters participate each in the benefits of the transfer, in the proportion which the amount of his subscription bears to the whole value of the thing insured; and this without regard to the date of the different subscriptions, or the priority of the policies, if more than one.

Distribution of salvage amongst the underwriters.

In France, if there be more than one policy, and the sum insured in the first policy itself amounts to the value of the thing insured, an abandonment to the underwriters on the first policy carries the whole property in the thing insured, and nothing remains to be abandoned to the underwriters on the subsequent policies.² In such case, accordingly, the policy first effected is alone considered binding, and the underwriters on the rest are discharged from all claim; and are, of course, entitled to no share in the salvage.³

In France.

In our own country a different rule prevails; and the assured in that case may sue both sets of underwriters; but cannot recover more than the amount of his loss, to which all the underwriters on both policies shall contribute according to the amount of their several subscriptions, with a consequent right to a proportionate share of the proceeds of the salvage.⁴

In case of double or over-insurance.

On the other hand, the assured is considered to be his own insurer to the extent of the sum not covered, and is

Where the whole interest is not covered.

¹ *Tunno v. Edwards*, 12 East, 488; *Goldamid v. Gillies*, 4 Taunt. 803.

² *Boulay-Paty*, Droit Mar. 116—121; 3 *Pardeus*, Droit Comm. p. 505.

³ *Ordonnance de la Marine*, liv. 3, tit. vi. art. 24, 25. Code de Com-

merce, art. 358, 359.

⁴ *Newby v. Reid*, 1 Bl. Rep. 416; 1 *Marshall*, Ins. 139—145. The law is the same in the United States; 3 *Kent*, Com. 289, but is frequently altered by express clauses in the policy.

consequently entitled to his proportionate share in the proceeds of the salvage.¹ Thus, suppose A. to have insured goods, the real value of which is 1000*l.*, to the extent of 800*l.*, of which sum B. subscribes 500*l.*, and C. 300*l.*; A., it is plain, stands his own insurer for 200*l.* A constructive total loss takes place, and A. abandons; if the proceeds of the salvage amount to 100*l.*, or a tenth of the whole insurable value, this is to be distributed among the parties to the insurance in the proportion of a tenth of their respective interests, *i. e.* to A. 20*l.*, to B. 50*l.*, and to C. 30*l.*, amounting together to 100*l.*

Mode of apportioning the salvage among policies on different subjects.

If there be three insurances, one on the ship and cargo, one on the ship only, and one on the cargo only, a question has been raised as to the mode in which the salvage should be shared amongst the different sets of underwriters. Emerigon adopts a mode of adjustment whereby the underwriters on ship and cargo, though they may have insured only the same amount that has been subscribed by the underwriters on the two separate interests respectively, shall yet be entitled to a double share of the effects abandoned: Mr. Marshall recommends the following more equitable method by which all would take an equal part in the salvage. Take the following data: let a ship, valued at 5000*l.*, and a cargo at 5000*l.* (making a total of 10,000*l.*) be insured by three policies, thus:

	£
On ship and cargo	3000
On the ship only	3000
On the cargo only	3000
Uninsured	1000
	<hr/>
	£10,000
	<hr/>

A shipwreck happens, and the net proceeds of the wreck of

¹ 2 Emerigon, c. xvii. s. 14, 273—275.

the ship are 500%, and of the sea-damaged cargo 500%, total 1000%. The adjustment should be as follows:

To the owners, for their part of ship and cargo un-	£
insured	100
To the insurers on ship and cargo, a moiety of three	
fifths of the produce of the wreck	150
and a moiety of three-fifths of the produce of	
the cargo	150
To the insurers on ship three-fifths of the produce	
of the wreck	300
To the insurers on goods three-fifths of the produce	
of the cargo	300
	<hr/>
	£1000
	<hr/>

The Ordonnance de la Marine decreed, that where money had been lent on bottomry, and also insured on the same subject, the lender on bottomry, in case of abandonment, should be paid the full amount out of the proceeds of the salvage, to the entire exclusion of the underwriters, supposing the salvage not sufficient for both.¹ Emerigon² and Pothier³ rested this law on the principle, that the underwriter, by virtue of the abandonment, was put exactly in the place of the assured, and, therefore, could not dispute the claim of the bottomry lender, who had become his creditor by the effect of this entire subrogation. Valin⁴ opposed this view, on the ground that abandonment is not an absolute substitution of the underwriter for the assured, but only to the extent of the insurance; that, consequently, the underwriter becomes upon abandonment a debtor to the bottomry lender, only in the proportion which the sum insured bears to the whole of the subject; and that, on principle, the

As between
insurers and
bottomry
bondholders.

¹ Liv. 3, t. 5, art. 18.

no. 49.

² Chap. xiii. s. 12, vol. ii. p. 269.

⁴ Comment. on Ord. liv. 3, tit. 5,

³ Traité des Contrats à la Grosse,

art. 18, vol. ii. p. 20.

bottomry lender and underwriter ought both to share in the benefit of the abandonment, in proportion to their respective interests.

These reasonings of Valin were adopted in the French Legislative Council;¹ and the 331st article of the Code de Commerce accordingly provides, that, upon abandonment, the proceeds of the property saved shall be divided equally between the lender on bottomry in proportion to his capital, and the underwriter in proportion to the amount insured.²

The law of this country is that bottomry contracts are without benefit of salvage.

Duties of the
master under
abandonment.

By the general law maritime, as recognized alike in this country and foreign states, the assured is bound, under circumstances authorizing an abandonment, to do his utmost to avert total loss, so as to lighten by the salvage, as far as possible, the burden which is to fall on the underwriters. In so doing he is considered to be the agent of the underwriters, and the exertions he makes in such capacity do not at all prejudice his right to insist on his abandonment. The clause to this end in our English policies runs thus:—"And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travail, for, in, or about the defence, safeguard, or recovery of the said goods and merchandises, or any part thereof, without prejudice to the insurance, &c."³

Binding duty. Although the language is, "it shall be lawful," the law and practice of this, and almost all other countries, imposes it upon him as his bounden duty. The Code de Commerce, in order to remove all ambiguity, has adopted the suggestion of Valin⁴ and Emerigon,⁵ and expressly enacted, that the

¹ See 3 Boulay-Paty, Droit Mar. 227—232.

² Code de Commerce, art. 331.

³ See the construction put upon this clause by the Court in *Stringer v. English, &c.*, Mar. Ins. Co., L. R.

⁴ Q. B. 676, 686.

⁵ Comm., liv. iii. tit. vi., *des Assurances*, art. 45.

⁵ 2 Emerigon, c. xviii. s. 7, p. 235.

assured is bound so to exert himself, "que l'assuré doit travailler," &c.¹

Immediately, therefore, that the emergency arises, and before notice of abandonment has been given, the master is bound to take every necessary measure for the defence, safeguard, and recovery of the thing insured; in so doing he acts as the agent for both parties, or, more accurately speaking, as the agent of the party who may eventually turn out to be interested in the salvage, and, as such, derive benefit from his exertions.² If no abandonment be made, or if abandonment is not justified by the circumstances, that party is, of course, the assured himself; and it is to him the master must look for all the expenses *bonâ fide* incurred in the agency. In case, however, of an abandonment which is either accepted or ultimately effectual, the underwriter is owner of the property from the moment of the casualty,³ and, therefore, the master, by operation of law, is his agent in so acting.

For what principals.

On this principle, if a captured ship be after condemnation repurchased by the master, the repurchase is, in the absence of notice of abandonment, for account of his owners; and supposing him to have acted *bonâ fide* and within his authority in the circumstances, they are bound by his acts; it is then an average loss, the extent of which is measured by the amount of the salvage expenses.⁴

Repurchase of ship by master.

Where, however, under similar circumstances, notice of abandonment has been given and accepted, and the repurchase not effected by the master till after such notice, it has been decided in the United States, that the repurchase was

¹ Code de Commerce, art. 381; see also 4 Boulay-Paty, Droit Mar. 308—310.

² 3 Kent, Com. 331.

³ Per Lord Campbell, *Miller v. Woodfall*, 8 E. & B. 493; 27 L. J. (Q. B.) 120, 123.

⁴ *M'Masters v. Shoolbred*, 1 Esp. 238. A master who repurchased

where there had been no condemnation, was held to have done so in his own wrong, as there had been no change of property, so that the original owners were entitled to take possession of their ship, without paying the expense of repurchase; *Wilson v. Forster*, 6 Taunt. 25; 1 Marshall, R. 425.

for the underwriters if they chose to take to it;¹ but that they are not bound by it.²

An American ship and cargo were captured by a French privateer and carried into Malaga, where the cargo was ultimately condemned as lawful prize, and sold for the benefit of the captors. The assured in New York abandoned to the underwriters on the cargo, who paid a total loss. Meanwhile a mercantile house at Malaga, at the request of the master, had purchased the cargo on its being put up for sale, for the benefit and on account of the assured and whomsoever else it might concern. The cargo was sold again by the Malaga house, for nearly twice the amount they gave for it; and the surplus produced by this sale was held by them as trustees, either for the assured or the underwriters, according to the determination of the Court. The Court held that this surplus belonged to the underwriters.³

Of course, if the master after abandonment of ship busies himself about performance of the contract of charterparty, for instance, by taking up another vessel in order to carry on the cargo or passengers, he is at least not the agent of the underwriters on ship in so doing, for their right and relation as owners and principals arise out of the abandoned ship, and extend no further; they have therefore no claim on the freight earned by the substituted ship. The master in hiring this vessel most probably acted as the agent of his owners,⁴ but not necessarily.⁵

¹ So held by Chancellor Kent (then Chief J.) in *Jumel v. Marine Ins. Co.*, 7 Johnson, N. Y. R. 423, 424.

² 3 Kent, Comm. 332. For this position the learned commentator cites the following authorities:—*Sadler v. Church*, 2 Caines, 286; *Jumel v. Marine Ins. Co.*, 7 Johnson, N. Y. R. 412; *United Ins. Co. v. Robinson*, 2 Caines, 280; *Willard v. Dorr*, 3 Mason, 161. These cases will be found collected and commented on, 2 Phillips, Ins., no. 1731

et seq.

³ *United Ins. Co. v. Robinson*, in error, 1 Johnson's N. Y. R. 591; see these cases collected in 2 Phillips, Ins., no. 1731 *et seq.*; especially *Columbian Ins. Co. v. Ashby*, 4 Peter, Sup. C. R. 139.

⁴ *Hickie v. Rodocanachi*, 28 L. J. (Ex.) 273; 4 H. & N. 455; *Kidston v. Empire Mar. Ins. Co.*, L. R. 1 C. P. 535; *Potter v. Rankin*, L. R. 5 C. P. 341, 371.

⁵ See the discussion in *Matthews v. Gibbs*, 30 L. J. (Q. B.) 55.

It is quite clear that the assured can recover for a total loss, as such, only the amount of the insurance, or the agreed value in the policy. It is also quite clear that he cannot recover an unrepaired average loss preceding a total loss, under the same policy, or under a plurality of policies if they be upon the same risk. Aggregation
of losses.

A ship "warranted free from American condemnation," in attempting to escape an American embargo, ran out of New York in the night, and sustained an average loss by stranding on the rocks of Governor's Island, where she was deserted by her crew, and next day was seized there by the Americans, and condemned by them for breach of the embargo. In these circumstances it was held that the assured was not entitled to recover; not a total loss, for that was caused by American condemnation, a risk expressly excepted by the policy; not an average loss, because the total loss, by subsequent seizure and condemnation, took away the right to recover in respect of the previous partial loss by sea damage.¹ Livie v.
Jansen.

Upon the general question, Lord Ellenborough said, "There may be cases in which, though a prior damage may be followed by a total loss, the assured may nevertheless have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss. Actual disbursements for repairs, in fact, made, in consequence of injuries by the perils of the sea, prior to the happening of the total loss, are of this description, unless, indeed, they are to be more properly considered as covered by that authority with which the assured is generally invested by the policy, 'of suing, labouring, and travelling for, in, or about the defence, safeguard, and recovery of the property insured;' in which case the amount of these disbursements Doctrine as
stated by Lord
Ellen-
borough.

¹ Livie v. Jansen, 12 East, 648. In other words, there was no accumula-

tion of losses in the end, but the second swallowed up the first.

might more properly be recovered as money paid for the underwriters under the direction and allowance of this provision of the policy, than as a substantive average loss to be added cumulatively to the total loss which is afterwards incurred in consequence of the sea risks."¹

*Le Cheminant
v. Pearson.*

In the next case of the same kind that came before the Courts, the previous partial loss consisted of actual disbursements for repairs in fact made prior to the total loss. A ship while in port at Jersey, before sailing, sustained an average loss by sea damage, which the plaintiff repaired; the ship having been afterwards totally lost, by capture in the course of the voyage, the plaintiff brought his action for a total loss, and claimed also, in his declaration, to recover in respect of the expenses incurred in the repairs of the previous partial loss. The Court of Common Pleas held, that the plaintiff might recover, in addition to a total loss, for the sums so expended.²

An unre-
paired loss is
a prejudice to
a sale.

If the assured, after sustaining an average loss, sell his vessel unrepaired, he is nevertheless entitled to recover for the partial loss, on the ground that the damage sustained is a continuing prejudice, for the ship's value must have been lessened by it. "Therefore, the amount of the loss must be calculated as though the ship had actually been repaired and proceeded on her voyage, or had foundered without being repaired, soon after the policy expired."³

These last words, from the judgment of Lord Campbell, point out that it is at the moment of the expiration of the policy the liability of the insurer is definitely determined, and that there can be no merger thereof in any subsequent

¹ 12 East, 655. I have ventured already, *ante*, p. 946, note 3, to dissent from the proposed mode of recovery, under what is called "the sue and labour" clause.

² *Le Cheminant v. Pearson*, 4 Taunt. 367; *S. P.*, *Stewart v. Steele*, 11 L. J. N. S. (C. P.) 155; 5 Scott, N. R. 927; *Blackett v. Roy. Exch.*

Ass. Co., 2 Cr. & J. 244.

³ Per Lord Campbell in *Knight v. Faith*, 15 Q. B. 649. As to the rule for calculating an unrepaired partial loss on a vessel sold under this condition, see *Pitman v. Universal Marine Ins. Co.*, 9 Q. B. D. 192; *ante*, p. 947.

loss. This prominently appeared in a case where, as it happened, the same insurer was liable for both losses.

In *Lidgett v. Secretan*,¹ *The Charlemagne* was insured, *Lidgett v. Secretan.*
 “at and from London to Calcutta, and for thirty days after arrival.” The same vessel was insured in a valued policy “at and from Calcutta” to a port in England. On her outward passage, consequently during the currency of the first policy, she struck upon a reef and sustained such damage that she was kept afloat only by continual pumping till her arrival at Calcutta. There she discharged her cargo, and was then placed in a dry dock for repairs. Part of the repairs had been done and the first policy had expired, when she caught fire and was totally destroyed, the second or homeward policy having attached as soon as she arrived at Calcutta. It was held under these circumstances, that the assured was entitled to recover under the first or outward policy the full amount of the partial loss, repaired or unrepaired, and under the second or homeward policy the full amount insured as for a total loss.

The second, being a valued policy, attached on the vessel with the agreed value, notwithstanding the unrepaired damage was then subsisting, as there was no fraud on either side; and consequently, when the total loss had occurred, the sum recoverable under this policy was the full agreed value.²

The principles thus established in our jurisprudence have Foreign law.
 been adopted and confirmed in that of the United States.³

In France it has been decided, after considerable fluctuation of opinion among the authorities, that cost of repairs, rendered necessary by prior sea damage, may be recovered cumulatively.⁴

¹ *Lidgett v. Secretan*, L. R. 6 C. P. 616.

² *Lidgett v. Secretan*, *supra*; *S. P.*, *Barker v. Janson*, L. R. 3 C. P. 303.

³ See the cases collected in 2 Phillips, Ins. no. 1742.

⁴ 4 Boulay-Paty, *Droit Comm.* Mar. 519—532, gives the earlier jurisprudence; the more recent decision, fixing the law as stated in the text, will be found in Nolte's edition of Benecke, vol. ii. pp. 191—193.

CHAPTER VII.

TOTAL LOSS.

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Total loss on ship and goods generally. AN absolute or actual total loss being, as we have seen, such a loss as gives the assured a right to claim from the underwriter the whole amount of his subscription without notice of abandonment, it remains to inquire what kind of casualty amounts to such a loss.

What it is. No better or more comprehensive answer can be given to this inquiry than in the words of Lord Abinger, already cited :—" If, in the progress of the voyage, the thing insured becomes totally destroyed or annihilated, or if it be placed by the perils insured against in such a position that it is totally out of the power of the assured or the underwriter to procure its arrival, the latter is bound, by the very terms of his contract, to pay the whole sum insured."¹

Criterion. The impossibility, owing to the perils insured against, of ever procuring the arrival of the thing insured, is, then, the criterion of an absolute total loss. If, by reason of those perils, all present possession and control over it, and all reasonable hope or possibility of ever ultimately recovering possession of, or further prosecuting the adventure upon it

¹ Per Lord Abinger in *Roux v. Salvador*, 3 Bing. N. C. 266, 286.

be gone, that is a case of absolute total loss, independently of any election on the part of the assured to treat it as such. Notice of abandonment would in such case be an idle formality. Nothing remains to be abandoned, either of property in possession, or of hope of ultimately recovering it.¹

In such cases, therefore, no abandonment is required. But if any remains of the wrecked ship or lost goods ultimately come to hand, or if any money had been realized abroad by their necessary and justifiable sale, such remains, or the net proceeds of such sale, are considered as a salvage to which the underwriters are entitled after payment of a total loss.² Hence it is that total losses are so frequently known in Insurance Law as "salvage losses without abandonment."

Such, then, being the general principle, the cases of total loss in which no notice of abandonment is requisite may be arranged in the two classes indicated by Lord Abinger, those, viz., in which the thing insured (1), is wholly destroyed or annihilated by the perils insured against: or, (2), is by the same perils wholly and irretrievably lost to the assured, so that it is totally out of his power or the power of the underwriter to procure its arrival. Classification.

With regard to the first head the question arises, what is meant by the words *wholly destroyed or annihilated* by the perils insured against, as applied to the subjects of Marine Insurance? Annihilation.

It is quite clear that these words cannot mean a change from entity into nonentity, as that is even a physical

¹ *Lex non cogit ad absurdum*. En cas de perte entière le délaissement est une formalité inutile; 2 Emerigon, c. xvii. s. 1, p. 208. "The general convenience of making an abandonment has led to the notion that it is more necessary than it really is—it is only necessary to make a constructive

total loss—if the loss is actually total no abandonment is necessary:" per Lord Ellenborough, *Mellish v. Andrews*, 15 East, 13, 15; *Rankin v. Potter*, L. R. 6 Ho. of Lds. (Eng.) 83, 156, 157.

² Per Lord Abinger in *Roux v. Salvador*, 3 Bing. N. C. 266, 288.

impossibility, and must, therefore, of course, be thrown out of consideration in treating of a contract of practical indemnity against substantial losses. It is equally clear that, if the thing insured go in bulk to the bottom of the ocean, or be reduced by fire to a heap of ashes, though, in either case, its remains have an existence in *rerum naturâ*, the thing itself is practically, and, as a subject of insurance, wholly destroyed, so as to entitle the assured, without notice of abandonment, to claim a total loss.¹

Shipwreck.

On the same principle, if the thing insured be by the perils insured against, reduced to a complete state of dismemberment, so as to have lost its characteristic form, and no longer be subsisting under the same denomination as that under which it was insured, this is an absolute total loss, though the constituent parts may all, or in great proportion, exist separately. Thus, if a ship in the course of the voyage be dismembered by perils of the sea, this is a clear case of total loss on ship; and it seems equally so where, though her hull may still hold together, yet the ship, as a ship, is destroyed, and subsists only as a wreck: nor is any notice of abandonment requisite in such cases to entitle the assured to claim a total loss.²

In case of perishable goods.

There is difficulty in determining when perishable goods shall be so far regarded as wholly destroyed and annihilated within the true meaning of these words in Insurance Law, as to give the assured a right to recover the whole sum insured on them without notice of abandonment. In one sense commodities of a perishable nature may be said to be wholly

¹ See 2 Emerigon, c. xvii. s. 3, p. 213. "In matters of business a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling when he has dropped it in deep water, though it may be possible, by some very expensive contrivance, to recover it;" per Maule,

J., in *Moss v. Smith*, 9 C. B. 103. So per Sewall, J., *Murray v. Hatch*, 6 Mass. Rep. 465.

² Les débris du navire naufragé existent, mais le navire n'existe plus; 2 Emerigon, 213; *Cambridge v. Anderton*, Ry. & Mood. 60; *S. C.*, 1 Car. & P. 213, and 2 B. & Cr. 691. See also *Bell v. Nixon*, Holt, N. P. Rep. 425.

destroyed for any practical purpose, when, by the progress of decomposition or other chemical agency, they have undergone a physical change of structure so as no longer to remain the same kind of thing as before. In such case the thing insured, in the words of Emerigon, “a cessé d'exister en essence, et dans la nature qui lui est propre.”¹

The question, which we shall revert to again, is, whether, if this physical change of structure have had its origin in the perils insured against, this is a total loss within the policy on the commodities so destroyed? Thus, suppose hides, fish, fruit, or other perishable articles, to have become changed in the course of the voyage, by the agency of fermentation or putrefaction originating in sea damage, into a mass of rottenness, so as to have wholly lost all saleable value, as hides, fish, or fruit, though they may produce a trifling sum if sold for glue or manure, is this a total loss under the policy?

Physical
change of
structure by
decomposition.

It was a question of very great difficulty, whether ever and under what circumstances, the subject of insurance remaining in species may yet be so totally lost to the assured that he may claim the full amount of the insurance without giving notice of abandonment. Lord Abinger, called upon to decide this question, lays down the following propositions in respect of perishable and imperishable commodities, which appear to be of universal applicability to the subjects of insurance respectively classed under these two heads:—“If the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the species be not utterly destroyed, that they cannot with safety be reshipped into the same or any other vessel; if it be certain that before the termination of the original voyage the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the

Deprivation.

¹ Chap. xvii. s. 3, vol. ii. p. 213.

impossi^r
consir^r
aga^r
th

*hands of strangers not under the control of the assured; if by any circumstance over which he has no control, they can never, or within any assignable period, be brought to their original destination; in any of these cases, the loss is in its nature total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle."*¹

Ship

*Foundering at sea.
More submerged.*

Thus, if a ship founders at sea, or goods go in bulk to the bottom of the ocean, so as to leave no reasonable chance of their recovery, this is a clear case of total loss. If, on the other hand, they be merely submerged in shallow water, so that there is a chance of getting them up again, but at a very considerable expense, this cannot be more than a constructive total loss, and the assured, in order to recover the whole amount of the insurance, must give due notice of abandonment.²

"If a ship," says Willes, J., "is so injured that it cannot sail without repairs and cannot be taken to a port at which the necessary repairs can be executed, there is an actual total loss, for that has ceased to be a ship which never can be used for the purposes of a ship; but if it can be taken to a port and repaired, though at an expense far exceeding its value, it has not ceased to be a ship, and unless there is a notice of abandonment, there is not even a constructive total loss."³

Missing ship

On the same principles, the assured, on the expiration of the time after which the legal presumption arises that a missing ship has foundered at sea, may claim a total loss, without notice of abandonment; for it would, indeed, be absurd to require from the assured a formal abandonment of his chance of recovering that which the law presumes to be irrecoverably lost.⁴ If, however, such ship should ultimately

¹ Per Lord Abinger, *Roux v. Salvador*, 3 Bing. N. C. 266, 279.

² *Anderson v. Royal Exch. Co.*, 7 East, 38; *Doyle v. Dallas*, 1 Mood. & Rob. 48. *S. L.* in *United States*, see *Sewall v. United States Ins. Co.*, 11 Pickering, Rep. 90.

³ Per Willes, J., in *Barker v. Janson*, L. R. 3 C. P. 303, 305.

⁴ *Houstman v. Thornton, Holt*, N. P. 242. Mr. Marshall says the assured in this case may recover "on abandonment," but he does not cite any authority which shows abandon-

chance to turn up, she is the property of the underwriters after they have paid for a total loss.

Every effective privation of the *spes recuperandi* amounts to an absolute total loss. If the thing insured be in the hands of strangers, and not under control of the assured, or by reason of other circumstances beyond his power it can never, or within no assignable period, be brought to its original destination—in such a case the fact of its remaining in species at any forced termination of the risk is of no importance. The loss is in its nature total to him who has no means of recovering his property, whether his inability arise from its annihilation, or from any other insuperable obstacle.¹

Privation of the *spes recuperandi*.

Goods were insured from London to the Isle of France, and the ship was wrecked off the coast of that island, but some of the goods, saved from the wreck and brought ashore there, fell into the hands of the natives, who destroyed part, and plundered the rest. The assured claimed a total loss; and it was objected to his claim, that he had given no notice of abandonment. Sir Vicary Gibbs overruled the objection, and said, "An abandonment is not necessary to make this a total loss: the portion of the goods which were saved from the wreck, though got on shore, never came again into the hands of the owners: it is, therefore, a total loss to them."²

Bondrett v. Hentigg.

Goods insured on a Baltic risk, were, with the ship, while in a Swedish port, seized and detained by orders of the Swedish government. The assured, on receipt of this intelligence, gave notice of abandonment, which was too late and wholly inoperative. Afterwards, and about two months before action brought, the goods themselves were seized and unladen by a military force acting under the orders of the Swedish government, and never restored. The Court were

Mellish v. Andrews.

ment to be necessary. In the United States it has been decided not to be requisite in such case; *Cambreling v. M'Call*, 2 Dallison, Rep. 280.

¹ See the remarks of Lord Abinger, 3 Bing. N. C. 279.

² *Bondrett v. Hentigg*, Holt, N. P. Rep. 149.

clearly of opinion that, as the loss continued absolutely total, the plaintiff might recover accordingly, without notice of abandonment.¹

Mullett v.
Shedden.

A cargo of saltpetre shipped in the East Indies by an American citizen, under licence from the Company, was seized at the Cape of Good Hope by a British man-of-war, and sold under decree of the Vice-Admiralty Court, for the benefit of the captors. Subsequently this decree was reversed on appeal, but the property, though directed to be, was not restored to the assured. The assured having claimed a total loss, it was held by Lord Ellenborough and the Court of King's Bench, that no notice of abandonment was necessary under the circumstances. "If," said his lordship, "instead of the saltpetre having been taken out of the ship and sold, and the property divested, and the subject-matter lost to the owner, it had remained on board the ship, and been restored at last to the owner, I should have thought there was much in the argument, that, in order to make it a total loss, there should have been notice of abandonment, and that such notice should have been given sooner; but here the property itself was wholly lost to the owner, and, therefore, the necessity of any abandonment was altogether done away."²

Result.

It accordingly appears that the assured, on seizure and confiscation or other effective deprivation of his goods, may claim a total loss without notice of abandonment, if he pleases; that, if no restoration takes place before trial, he may recover in such action the whole amount he claims; but that if before that time a restoration of any part takes place, he can only recover an average loss. In order to recover as for a total loss under such circumstances, in any event, he must give due notice of abandonment, and bring his action while the circumstances continue such as justify abandonment. In fact, as Lord Ellenborough says, in *Mellish v.*

¹ *Mellish v. Andrews*, 15 East, 13.

Mar. Ins. Co., L. R. 4 Q. B. 676; in

² *Mullett v. Shedden*, 13 East, 304,
310; accord. *Stringer v. English, &c.*,

error, 5 Q. B. 599.

Andrews, "where there is an abandonment, the risk is thrown on the underwriters: where there is no abandonment, the party takes the chance of recovering according to his actual loss."¹

We proceed to consider the application of these principles to the case of the ship.

Total loss on
ship neces-
sarily sold.

Where, in the course of the voyage and by the action of the perils insured against, the ship becomes an absolute wreck, broken in pieces and dismembered, so that "her planks and apparel are scattered on the sea,"² this is a case of total loss on ship, "although the whole or a greater part of the fragments may reach the shore as wreck."³ As the specific thing called a ship, it has perished, and only the wreck remains. *Les débris du navire naufragé existent, mais le navire n'existe plus.*⁴ In such a case, no doubt, the assured may recover the whole amount of the insurance without notice of abandonment, the wreck being salvage for the benefit of the underwriter.

It is also established in our jurisprudence, that, although the damage be somewhat short of this complete wreck, yet, if it be so great as to make it wholly impossible for the master, by any means in his power, to repair the vessel so as to keep the sea as a ship,—or to do so except at a cost that would exceed the ship's value when repaired,—or if she be stranded in such a position that her recovery for the purposes of the adventure is beyond all hope,—and the master consequently acting *optimâ fide* for the benefit of all concerned, sells the ship where she lies, as the only chance of saving anything from the disaster,—the assured may treat this as an absolute total loss of the ship, and recover the whole

Condition to
justify sale.

¹ *Mellish v. Andrews*, 15 East, 16; and see *Goldsmid v. Gillies*, 4 Taunt. 803; *Tunno v. Edwards*, 12 East, 488.

² Per Dallas, C. J., in *Bell v.*

Nixon, Holt, N. P. 423.

³ Opinion of the Judges delivered to the House of Lords, in *Irving v. Manning*, 1 H. L. Cas. 817.

⁴ 2 Emerigon, c. xvii. s. 3, p. 213.

amount of the insurance, without giving notice of abandonment.¹

Sale does not constitute the loss.

It is not, however, the sale that entitles the assured to recover without notice of abandonment (in the language of Bayley, J., "there is no such head in Insurance Law as loss by sale,"²) but the state to which the ship has been reduced by the perils insured against previous to the sale, and which alone justified the master in selling. The loss, in fact, before the sale, must be total, independently of the election of the assured to treat it as such, otherwise the mere fact of the sale will not have the effect of converting an average into a total loss.³

Effect of sale when justifiable.

Farnworth v. Hyde.

The doctrine in its application, effect, and consequence, is very tersely expounded by the Court of Common Pleas in the case of *Farnworth v. Hyde*. The jury in that case had found that the sale of both ship and cargo (the cargo being of timber) was justified by the circumstances. "We are, therefore," says Montague Smith, J., in delivering judgment, "to say what is the legal effect of this sale so found⁴ by the jury to have been right and necessary. We say that such sale supervening on the existing state of things was an actual total loss. A right sale passes the property; and when the property is passed from the assured by reason and in consequence of a peril insured against, the cargo is actually lost to him as much as if it was destroyed. We are aware that the interest of the underwriter may at times be sacrificed by a sale, where the ship or cargo might have been

¹ *Idle v. Royal Exch. Ass. Co.*, 3 Moore, 115; 8 Taunt. 755; *Robertson v. Clarke*, 1 Bing. 445; *Robertson v. Carruthers*, 2 Stark. 571; *Cambridge v. Anderton*, Ry. & Mood. 60; 1 Carr. & P. 213; *S. C.*, 2 B. & Cr. 691; *Doyle v. Dallas*, 1 M. & Rob. 48; *Gardner v. Salvador*, *ibid.* 116; and see judgment of Lord Abinger in *Roux v. Salvador*, 3 Bing. N. C. 266, 288.

² In *Gardner v. Salvador*, 1 Mood. & Rob. 117.

³ See the very able argument of Maule, J. (then at the bar), in *Roux v. Salvador*, 3 Bing. N. C. 266, 270.

⁴ This finding was set aside in the Exchequer Chamber. The case therefore is of no authority. But the judgment here cited, upon the assumption on which it proceeded, viz., the assumption of "a right sale," a sale forced upon all parties concerned by the perils insured against, is still of the highest authority.

saved wholly or partially, if notice of abandonment had been given; but we are also aware that if a right sale, such as is here proved, is not held to be an actual total loss, it would be for the interest of the assured, where a notice of abandonment would make a constructive total loss, to give notice of abandonment and leave the ship or cargo to perish unsold; and so the benefit of salvage from a sale would be lost by reason of the delay required for notice of abandonment. . . . The opposing considerations for and against requiring notice of abandonment when the property insured exists in species are stated in *Roux v. Salvador* and *Knight v. Faith*,¹ respectively. . . . The judgment in *Knight v. Faith* accords with *Roux v. Salvador* in holding that there may be a total loss without abandonment where there has been a right sale caused by urgent necessity, with full proof that everything was done *optimâ fide*, and for the real benefit of all concerned. There is an apparent difference of opinion in these two decisions as to the degree of imminent danger which should be held to be such urgent necessity as would justify a sale. But the sufficiency of the degree of danger is within the province of the jury."²

These observations of the Court appear to receive illustration from the case of *Stringer v. English, &c., Insurance Company*.³ That was a case of seizure by a United States cruiser, and of suit in the Prize Court of New Orleans. After many months there was judgment against the captors, and appeal from this judgment, and a sale of ship and cargo upon interlocutory order of the Court of Appeal, as a precautionary measure against deterioration; and whether this sale ought to have been prevented by the assured giving bail to the full value was the question on which depended his right, in the absence of an available notice of abandonment,

Stringer v.
English Mar.
Ins. Co.

¹ 15 Q. B. 649.

² *Farnworth v. Hyde*, 34 L. J. (C. P.) 207, 210. For an account of Lord Campbell's decision in *Knight v. Faith*, see per Blackburn, J., in

Rankin v. Potter, L. R. 6 House of Lords (E. & J.) 83, 130, cited post, p. 1001.

³ L. R. 4 Q. B. 676; in error, 5 Q. B. 599.

to recover as for a total loss. The Court upon this question were of opinion, that considering the fluctuating value of American currency at the time, no prudent man would have given security to the full amount, and that the sale, therefore, not being the gratuitous act of the assured, was one of the direct and immediate consequences of the original seizure. "We come, therefore, to the conclusion of fact, that the assured could not by any means which he could reasonably be called on to adopt have prevented the sale by the American Prize Court, which at once put an end to all possibility of having the goods restored *in specie*, and consequently entitled the assured to come upon the insurers for a total loss."¹

Cambridge v.
Anderton.

A leading case upon this question comprised these facts:—A timber-laden ship, insured from Quebec to Bristol, in sailing down the St. Lawrence struck upon the rocks, and got so fast set that the master, after making every possible effort, could not get her off, but was obliged to leave her there exposed to a heavy sea.² By surveyors, and, amongst others, a Lloyd's agent from Quebec, she was examined and found to be so damaged, that, although still retaining the form of a ship, she was only saved from going to pieces by the timber, which formed the greater part of the cargo; and, in the judgment of the surveyors, the expense of getting her off the rocks (if that could be accomplished), and repairing her, would exceed her value when repaired. They, therefore, advised the master to sell her, which he, in ignorance of the insurance, did, together with her register; and the purchaser, having succeeded in getting her off the rocks, repaired and sent her on another voyage, at the outset of which she was lost in the Gulf of St. Lawrence. The

¹ Per Cur., *Stringer v. English, &c.*, Mar. Ins. Co., L. R. 4 Q. B. 676, 691, 692; on appeal, 5 Q. B. 599.

² Before the master left the ship to go to Quebec for advice, he had found, on examination, "that the

keel had gone, fore and aft, and pieces of it were washed on shore, the stem and gripe were gone, and the ship was bilged, hogged and twisted in such a manner that he considered it impossible to make her seaworthy;" 4 Dowl. & Ry. 204.

plaintiff, who had never given notice of abandonment, brought his action for a total loss.

Lord Tenterden told the jury to look, not so much at the acts of the parties, whether buyers or sellers, as at the state of the ship itself. "If," said his Lordship, "the jury are of opinion that this vessel could not be repaired at all, or that she could not be repaired without incurring an expense equal to or greater than her value, then I shall hold, that, although she may exist in the form of a vessel, and be afterwards sold with her register, the plaintiff will be entitled to recover as for a total loss, with benefit of salvage."¹ The jury found a verdict for a total loss.

The Court in banc refused to disturb that verdict by sending the case to a new trial. Lord Tenterden on that occasion said, "If the subject-matter of insurance remained a ship, it was not a total loss; but if it were reduced to a mere congeries of planks, the vessel was a mere wreck: the name you may think fit to apply to it cannot alter the nature of the thing." Bayley, J., on the same occasion, said, "I take the legal principle to be this: if, by means of any of the perils insured against, the ship ceases to retain that character, and becomes a wreck, that is a total loss, and the master may sell her, and the assured may recover for a total loss, without notice of abandonment."²

From the above statement of the case, founded upon a collation of the two *Nisi Prius* reports with those in banc, the ship at the time of the sale appears to have been "a mere congeries of planks;" and the case is a direct authority for the position, that when a ship reduced to such a state is sold abroad, the plaintiff need give no notice of abandonment in order to recover as for a total loss. That position was

¹ 1 Ry. & Mood. 61; and see, also, 1 Carr. & P. 214.

² *Cambridge v. Anderton*, 2 B. & Cr. 691; 4 Dowl. & Ry. 203; *S. C.*, Ry. & Mood. 60; 1 Carr. & P. 213; see *S. P.*, *Robertson v. Clarke*, 1 Bing. 445; 8 Moore, 622, where the

loss was also held total without notice of abandonment; see also *Allen v. Sugrue*, 8 B. & C. 561; 3 M. & Ryl. 9; at N. P., *Danson & Lloyd*, 188; in this case, however, as appears by the N. P. report, notice of abandonment was given.

afterwards assumed by Lord Tenterden in his summing up to the jury in *Doyle v. Dallas*,¹ and in the subsequent case of *Gardner v. Salvador*, Bayley, J., states the law to the same effect in these terms:—"The question in this case is, whether you are satisfied there has been a total loss by the perils of the seas. I know of no such head in Insurance Law as loss by sale. If the situation of the ship be such that by no means within the master's reach it can be treated so as to retain the character of a ship, then it is a total loss. If the master, by means within his reach, can make an experiment to save it, with the fair hope of restoring it to the character of a ship (*i.e.*, a sea-going vessel), he cannot, by selling, turn it into a total loss. *Bona fides* in the master will not decide the question, for if he sells erroneously what is entitled to the character of a ship, though he thinks it a wreck, it will not do."²

Roux v.
Salvador.

In the case of *Roux v. Salvador*, however, when before the Court of Common Pleas, Tindal, C. J., dissented from this doctrine of the case of *Cambridge v. Anderton* as opposed to the weight of previous authorities, especially to the two *Nisi Prius* decisions of *Allwood v. Henckell* and *Hodgson v. Blackiston*,³ which he regarded as laying down the proposition, without any limitation, that a notice of abandonment is necessary, though ship and cargo have been justifiably sold and converted into money, at the time when the notice of loss is received.⁴ But the argument of Mr. Maule, and the judgment pronounced by Lord Abinger in that same case when in the Court of Error, have set upon an established basis the prevailing doctrine of our law upon this question by affirming the doctrine contained in *Cambridge v. Anderton*.⁵

¹ *Doyle v. Dallas*, 1 Mood. & Rob. 48, 54.

² *Gardner v. Salvador*, 1 Mood. & Rob. 116; see also *Tanner v. Bennett*, Ry. & Mood. 182; and *Underwood v. Robertson*, 4 Camp. 138, where no notice of abandonment appears to have been given.

³ *Allwood v. Henckell*, 1 Park, Ins. 399; *Hodgson v. Blackiston*, 1 id. 400.

⁴ See judgment of Tindal, C. J., in *Roux v. Salvador*, 1 Bing. N. C. 539—544.

⁵ *Roux v. Salvador*, 3 Bing. N. C. 266, 269, 277, 278.

"The decision of the Court of Exchequer Chamber in *Roux v. Salvador*," says Blackburn, J., "was, as far as I can learn, received with general approbation at the time. There was, however, one exception; Lord Campbell never could be brought to think it right. In the case of *Fleming v. Smith*,¹ the counsel for the applicants, the attorney-general Jervis and Sir F. Thesiger, argued, as I think, logically from the decision in *Roux v. Salvador*, that notice of abandonment could not be in any case required, except where there was something which could be done by the underwriters in consequence, and then the failure to give notice of abandonment might be material as determining the election which the assured had whether to treat the loss as total or not. This, as I have already stated, is what I consider to be the law. Lord Campbell was of a different opinion, and in his opinion says: 'The law therefore requires that notice shall be given in order to convert a constructive into a total loss.' But though that was his opinion, it was not the judgment of the House of Lords. Lord Cottenham, Chancellor (and Lord Brougham concurred in his opinion), carefully puts the decision exclusively on the ground that the assured had in fact elected to treat the loss as a partial loss only. This studied silence on his part may prevent us from saying that he differed from Lord Campbell; but he certainly did not express any concurrence with him.

"After this, in the Queen's Bench, when Lord Campbell was Chief Justice, there arose the case of *Knight v. Faith*.² The manner in which that judgment came to be delivered was very peculiar. There was a very brief case stated for the opinion of the Court of Queen's Bench. On the statements in which the Court came to the conclusion, as stated in the judgment, that 'slight repairs might have been sufficient again to fit the ship for navigation;' the Court said³ that though the ship was sold, 'we are of opinion that as against the insurers such is not shown to be lawful.' On such facts

¹ Ho. of Lords Cas. 513.

² 15 Q. B. 657.

³ 15 Q. B. 649.

the assured could never have recovered for a total loss, even if he had delivered all possible notices of abandonment from first to last. Yet the Court forced the counsel to amend the case, by inserting a statement that no notice of abandonment was given; and pronounced an elaborate judgment on a point which it was wholly unnecessary to notice, except for the purpose of recording dissent from the decision of the Exchequer Chamber in *Roux v. Salvador*. It should in candour however, be added, that the other judges of the Court joined Lord Campbell in this. Still I think that the fact that a judgment was not necessary for the decision of the case before the Court always diminishes its authority. And I think that on perusing the judgment of *Knight v. Faith* it will be found that no argument is produced which had not been used in *Roux v. Salvador*, and that no new authority is produced except Lord Campbell's own opinions in *Fleming v. Smith* and a passage from the judgment of Lord Chancellor Cottenham, in *Stewart v. Greenock Marine Insurance*."

*Rankin v.
Potter.*

The statement just given is cited from the opinion of Blackburn, J., delivered before the House of Lords in *Rankin v. Potter*,² and the House in that case expressly referred to and affirmed the doctrine of the Court of Exchequer Chamber in *Roux v. Salvador*, "that notice of abandonment could not be in any case required except where there was something which could be done by the underwriters in consequence."

The cases referred to as authorities for a contrary opinion by Tindal, C.J., only show that the mere fact of sale abroad, irrespective of the state of the ship or cargo that should have justified it, does not constitute an absolute total loss, though the assured may receive intelligence at one and the same time of the loss and the sale. Nor can the assured himself if the ship, though much damaged, is still subsisting as a ship when he receives the intelligence, by electing to sell instead of repairing her on the probable estimate of the expense of repairing being greater than her repaired value,

¹ 2 Ho. of Lords Cas. 159.

83, 129, 130.

² L. R. 6 H. of Lds. (E. & I.)

entitle himself to recover a total loss without notice of abandonment.

A ship from Carlscrona (in Sweden) to London was in the course of the voyage so sea-damaged as to be forced to run into Warburg a small fishing place on the Swedish coast, where on survey she was reported incapable of proceeding on her voyage without thorough and very expensive repairs. The assured on hearing this, without giving any notice of abandonment, stated the facts to the underwriters and asked directions how to proceed; but they declined to interfere, and he ordered the sale of the ship and cargo (the latter undamaged) for the benefit of all concerned. By sale on the spot they realized so little, that, after deducting the expense of the sale and salvage, there was a balance of 20% against the assured. He on this brought his action for a total loss, and Lord Ellenborough directed a non-suit, on the ground that, as the ship continued to subsist in species in the place whither she was carried, this was not a total loss without notice of abandonment. On motion for a new trial, the Court on the same ground refused the rule.¹

Martin v. Crockatt.

A ship bound from Hull to Quebec was obliged by tempest to run into Limerick, where on survey she appeared much damaged, and, as she could not be repaired at Limerick and the agent of the assured conceived it to be impossible to remove her elsewhere, she was resurveyed condemned and broken up where she lay, as the best course for all concerned. No notice of abandonment having been given, it was held that the assured could not recover as for a total loss. Dallas, C.J., after admitting that there were cases in which the assured may claim a total loss without abandonment, added, "But if the case be doubtful, the assured ought not to take upon himself to determine for the underwriters, to break up the ship, and call upon them for a total loss."²

Bell v. Nixon.

¹ *Martin v. Crockatt*, 14 East, 465.

mous that notice of abandonment

² *Bell v. Nixon*, Holt, N. P. 423, 425. The Court in banc were unani-

was necessary in this case.

Arrival of the
wreck.

Whether, if the ship reach her home port, or that of her destination, in so shattered and dismembered a state as to be no longer a ship but a wreck, the assured may recover for a total loss without notice of abandonment, is only another form of the same question depending for solution on the same condition. If she be wrecked in pieces off such port, so that nothing but her fragments come to hand, there can be no doubt that he may, and the wreck will then be a salvage for the benefit of the underwriters.

If, however, her planks still hold together, so that she retains the shape of a ship, though irreparable for sea again except at a cost greater than her value when repaired, the safer course would be to give notice of abandonment; and if that be done, the fact of her being brought thus disabled into her port of destination will make no difference to the right of the assured to claim a total loss. It was so held in *Shawe v. Felton*,¹ and in *Allen v. Sugrue*:² and the law as to this point is the same in the United States.³

Effect of sale
on notice of
abandonment.

If the assured have given notice of abandonment and then orders a sale, this will not, it seems, operate as a waiver of his notice, if that notice were justified by the existing facts, *e.g.*, if the ship is, as a ship, wholly irreparable except at a cost greater than her repaired value.⁴ At the same time, it must be added that such a course on the part of the assured personally should only be followed under very exceptional circumstances.

¹ *Shawe v. Felton*, 2 East, 129.

² *Allen v. Sugrue*, Dans. & Ll. 188; *S. C.*, 8 B. & Cr. 561; 3 Man. & Ryl. 9. See, too, the case of *Samuel v. Royal Exch. Ass. Co.*, 8 B. & Cr. 119; and also the case of the ship *Laurel* (*Stewart v. Greenock Mar. Ins. Co.*, 2 H. L. Cas. 159); a case which, as Lord Truro remarks, "seems some-

what in advance of prior determinations:" per Lord Truro, 1 Macqueen, H. L. Cas. 334, 339.

³ *Ralston v. Union Ins. Co.*, 4 Binn. 336; *Peters v. Phoenix Ins. Co.*, 3 Serg. & Rawle, 25.

⁴ *Allen v. Sugrue*, Dans. & Ll. 188.

Most perishable goods are insured in this country "free from average," the underwriter thereby stipulating that, in respect of such articles, he will be liable for nothing short of a total loss. Consequently the turning point in cases of this kind usually is, what, upon articles so insured, amounts to a total loss? Not that a total loss upon goods that are so insured at all differs from a total loss on goods that are not so insured. As Lord Abinger says, "the memorandum does not vary the rules upon which a loss shall be partial or total: it does no more than preclude the indemnity for an ascertained partial loss."¹

Total loss on goods necessarily sold or destroyed on voyage.

Cases of this kind are divisible into two classes: 1. Where the loss occurs during the voyage, and the goods never arrive at their destination. 2. Where the assured claims to recover on memorandum articles arriving sea-damaged.

Classification of cases.

Confining our attention to the former of these classes in the meantime, this is the established rule of law in respect of them:—If perishable goods, by reason of being sea-damaged in the course of the voyage, are necessarily unshipped at an intermediate port, and found to be reduced either to such a state of absolute putridity that they cannot with safety be reshipped into the same or any other vessel, and are, consequently, then and there thrown overboard; or to be in such a state of rapidly progressive decay that, if sent on to their port of destination, their species itself would disappear before arriving there, and are therefore sold where they lie—in such cases there is an absolute total loss, within the meaning of the policy; the assured being entitled to the whole amount of the insurance without notice of abandonment, and the underwriters to the benefit of any salvage that may ultimately come to hand.²

First class.

¹ Per Lord Abinger in *Roux v. Salvador*, 3 Bing. N. C. 266, 277, 278.

² *Dyson v. Rowcroft*, 3 B. & P. 474; *Cologan v. London Ass. Co.*, 5 M. & Sel. 447 *Roux v. Salvador*, 3

Cocking v.
Fraser over-
ruled.

By the rule as thus established, the decision of Lord Mansfield in *Cocking v. Fraser*,¹ according to which nothing short of "absolute destruction of the goods by the wreck of the ship" would suffice, must now be held to be overruled. It was expressly dissented from severally by Lord Kenyon,² Lord Alvanley,³ and Lord Ellenborough,⁴ the latter saying that, "if obliged to choose between the two, he should incline to the opinion of Lord Alvanley in *Dyson v. Rowcroft*, in preference to that of Lord Mansfield in *Cocking v. Fraser*."

But supported
to its full
extent in the
United States.

In the United States the rule in *Cocking v. Fraser* is supported to its fullest extent; and the law there, in respect of perishable articles within the memorandum, is, in the words of Chancellor Kent, that "the insurer is secure against all damage to them, whether great or small, whether it defeats the voyage, or only diminishes the price of the goods, unless the article be completely and actually destroyed so as no longer physically to exist."⁵

Dyson v.
Rowcroft.

In our own jurisprudence, on the contrary, there has been a tendency to relax the extreme rigour of the rule laid down by Lord Mansfield. A cargo of fruit insured "free from average" from Cadiz to Lisbon, was in consequence of tempestuous weather necessarily carried into Santa Cruz (an intermediate port), where it was found to be so much damaged by sea water that it had become rotten, and so noxious that it was necessarily thrown into the sea. The Court of Common Pleas held that the assured might recover for a total loss without giving notice of abandonment.⁶

Cologan v.
London Ass.
Co.

A cargo of wheat, "warranted free from average" from Quebec to Teneriffe, was captured and recaptured and carried by

Bing. N. C. 266; overruling *Cocking v. Fraser*, 4 Dougl. 295; and on same point, *Roux v. Salvador*, below, 1 Bing. N. C. 524.

¹ *Cocking v. Fraser*, 1 Park, 247; 1 Marshall, 226; Benecke, Pr. of Indem. 270. See also the case reported, 4 Dougl. 295.

² In *Burnett v. Kensington*, 7 T. R. 210, 222.

³ *Dyson v. Rowcroft*, 3 B. & P. 474, 475, 476.

⁴ In *Cologan v. London Ass. Co.*, 5 M. & Sel. 447, 455.

⁵ 3 Kent, Com. 295. See also *Saltus v. Ocean Ins. Co.*, 14 Johnson, N. Y. Rep. 138; *Morean v. United States Ins. Co.*, 3 Washington Circ. Court Rep. 250.

⁶ *Dyson v. Rowcroft*, 8 B. & P. 474

the recaptors into Bermuda, where, in consequence of scarcity, an embargo was put on the wheat. In order to repair the ship the cargo was permitted to be unloaded, and the whole was landed, except about 600 bushels which were in such a state from the sea water that the magistrates, out of regard to the public health, ordered it to be thrown into the sea. As to this part of the case, the Court of King's Bench although it was unnecessary, as notice of abandonment had been given, intimated a strong opinion that there was an absolute total loss on the wheat thus thrown into the sea. "Considering the contract of insurance," Lord Ellenborough said, "as a contract of indemnity, it surely cannot be less a total loss because the commodity subsists in species, if it subsists only in the form of a nuisance. There is a total loss of the thing, if by any of the perils insured against it is rendered of no use whatever, though it may not be entirely annihilated."¹

The case of *Roux v. Salvador* (on appeal) is now the leading authority on this question in our jurisprudence. It goes further, and shows that if sea-damaged goods are sold at an intermediate port, because they will inevitably perish before reaching their destination, by reason of the putrefaction already commenced and not to be arrested by any means at the master's disposal—this for the assured, who receives intelligence at one and the same time of the loss and the sale, is a total loss, without notice of abandonment, although the goods, at the time of sale, still subsisted in species, and commanded a price in the market as and for what they were described as being in the policy.

*Roux v.
Salvador.*

The case was this:—Hides insured, "free from average," from Valparaíso to Bordeaux, were necessarily landed at Rio de Janeiro in order to repair the ship, and then were found to be in a state of incipient putrefaction occasioned

¹ *Cologan v. London Ass. Co.*, 5 M. & Sel. 447, 454, 455. This case, in so far as it may be considered an authority for the position that there can be a total loss of *part* of a cargo

of memorandum articles shipped and insured in bulk, is now overruled by *Ralli v. Janson*, 6 E. & B. 422; 25 L. J. (Q. B.) 300.

by moisture from the leak, being all, as it is termed, "greased," the hair, *i.e.*, coming off in the fingers of those who handled them. As this greasing could not be stopped by any means practicable at Rio, and as in consequence of its progress the hides would have lost the character of hides before they arrived at their destination, they were sold at Rio for the gross sum of 273*l.*, as hides, for the purpose of being tanned, and were so tanned by the purchasers.

The assured, who had at the same time notice of the loss and the sale, brought his action as for a total loss, without giving notice of abandonment, and the Court of Exchequer Chamber, reversing the judgment of the Court of Common Pleas, held that he was entitled to recover.¹

"In the case before us," said Lord Abinger, "the jury have found that the hides were so far damaged by the perils of the sea, that they never could have arrived in the form of hides. By the process of fermentation and putrefaction which had commenced, a total destruction of them before their arrival at their port of destination became as inevitable as if they had been cast into the sea or consumed by fire. Their destruction not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold; and the facts of the loss and sale were made known at the same time to the assured. Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. It appears to us therefore, that this was not the case of what has been called a constructive total loss, but of an absolute total loss, of the goods; they could never arrive; and at the same moment when intelligence of the loss was received all speculation was at an end."

Following the principle of this decision it was held by the Queen's Bench Division, that where a cargo of coals, damaged by sea-water in the course of the voyage, was unloaded at a

¹ *Roux v. Salvador*, 3 Bing. N. C. 266; 1 Bing. N. C. 524.

port of refuge, and, being found in a state that involved great danger of spontaneous combustion if the coals were again put on board ship, was necessarily sold where it lay, there was a total loss within the policy without notice of abandonment.¹

No degree of loss in bulk, in quality, or in value, will, however, entitle the assured to put an end to the adventure, and recover a total loss without notice of abandonment on goods warranted free from average, unless such damage involves their total destruction in species, either actual or inevitable.

The limit involved in the above rule.

If the commodity can be forwarded to its port of destination with any reasonable prospect of its arriving there in species, however damaged, the assured who has failed to send it on, or has sold it at an intermediate port, cannot recover for a total loss, at all events without notice of abandonment.

Wheat insured "free from average" from Waterford to Liverpool, was being carried down the river from Waterford when the ship struck and was run aground, to prevent her sinking, in a place where her hull was completely under water at every high tide. About a month after this stranding, the wheat was got out much damaged; one-third of it being thrown away as wholly useless. The other two-thirds were kiln-dried, and might have been sent on to Liverpool and sold there; instead of this, however, this residue was sold at Waterford for about 250% gross, and 90% net. Lord Ellenborough held, that in this case the assured could not recover for a total loss on the wheat without notice of abandonment, because it might have been sent on to its port of destination in a saleable state as wheat.²

Anderson v. Royal Exch. Ass. Co.

Tobacco and sugar insured "free from average" from Heligoland to London, were off Heligoland when the ship in which they were carried was wrecked, and were got ashore there but in a very damaged state; the sugars having been mostly

Thompson v. Royal Exch. Ass. Co.

¹ Saunders v. Baring, 34 L. T. N. S. 419.

² Anderson v. Roy. Exch. Ass. Co., 7 East, 38.

washed out of the hogsheads, and the tobacco entirely spoiled by sea water, so as to be worth nothing at all to the assured. The Court of King's Bench unanimously held that the assured, who had not abandoned, could not recover for a total loss.¹ Lord Abinger remarks, on this case, that "the tobacco and sugar, though damaged by the sea, were in the hands of the shippers at Heligoland; and, as stated by Lord Ellenborough in his judgment, for anything that appeared, might have been forwarded to their port of destination."² Lord Abinger probably spoke from recollection of what had been said by Lord Ellenborough in his own hearing; for nothing of the kind appears in the printed report, which is, however, very brief.

Hedburg v.
Pearson.

In the case of fifty-four hogsheads of sugar from Gottenburg to Stralsund, the ship in the course of the voyage was stranded and bilged at Copenhagen. Every one of the fifty-four hogsheads was saved from the sea, and in every hogshead there were some loaves of sugar left, though the total quantity of sugar saved was little more than enough to fill one hogshead; seventy of the loaves were saved dry. The Court of Common Pleas held that this was not an absolute total loss,³ obviously because a portion of the cargo was saved in a saleable state as sugar, and might, as such, have been sent on to its port of destination.

Navone v.
Haddon.

The same principle was applied in the case of eighty-one bales of waste silk insured "free from average" from Leghorn to Liverpool. The ship being compelled by stress of weather to put into Gibraltar for repairs, her cargo was necessarily unloaded. Some of the bales were much damaged by salt water, and were consequently sold at Gibraltar by the master, in the exercise of what the jury found to be a reasonable discretion, and such as a prudent uninsured owner would have used, but no one of the bales was so damaged as to make its whole contents useless for any mercantile purpose.

¹ Thompson v. Royal Exch. Ass. Co., 16 East, 214.

² Hedburg v. Pearson, 7 Taunt. 154.

³ 3 Bing. N. C. 280.

All the silk might, at a reasonable and moderate expense, have been put in a condition to be brought home by another vessel, and some of it was, in fact, brought home to England and sold as silk, though in a very deteriorated state. The Court of Common Pleas held that this was not a total loss, and consequently that the underwriters were not liable.¹

So much for the liability of underwriters in respect of goods warranted "free from average," for a total loss by the perils insured against, before the arrival of the goods at their place of destination in the policy. If, however, such goods so insured do arrive at their port of destination, still in species but damaged, there is not a total loss, and, consequently, no liability on the underwriter.

Where perishable goods arrive in species, there can be no total loss.

Thus much is admitted by Lord Abinger in his judgment in *Roux v. Salvador*.² Lee, C.J., indeed, at *Nisi Prius*, before the memorandum was introduced into English policies seems to have held that where perishable goods arrived, but so damaged as not to be worth the freight, this was a total loss.³ But this case must now be deemed to be overruled by the numerous cases in which the point has been otherwise determined, and uniformly in the same way.

Boyfield v. Brown, overruled.

Thus, upon fruit insured "free from average" from Lisbon to London, and arriving so damaged by the perils insured against as to have lost 80 per cent. in value, Lord Kenyon held the underwriters not to be liable: "the cargo, if it be one of those mentioned in the memorandum, must be wholly and actually destroyed, to entitle the assured to recover."⁴ In this case it would seem that the fruit, neither physically destroyed nor totally extinguished in value, was still fruit and saleable as such, though at a very reduced price. So in respect of a cargo of peas, warranted free from average, which

M'Andrews v. Vaughan.

Mason v. Skurray.

¹ *Navone v. Haddon*, 9 C. B. 36.

⁴ *M'Andrews v. Vaughan*, 1 Park,

² 3 Bing. N. C. 266, 278.

Ins. 262.

³ *Boyfield v. Brown*, 2 Str. 1065.

reached the port of destination so damaged as to be worth only one-fourth of the freight, the jury, under the direction of Lord Mansfield, found for the underwriter, the peas appearing to have been sold as peas.¹

Glennie v.
London Ass.
Co.

Under a policy on rice insured "free from average" from Charleston to Liverpool, the ship in the port of Liverpool took the ground while endeavouring to get into the dock gates, filled with water and became a wreck; the rice was taken out of her in small craft as she lay, and sold in Liverpool for 972*l.*; the freight amounting to 1762*l.* This was held not to amount to a total loss on the rice. Lord Ellenborough said, "I think it quite clear that this is a case of particular average, and not of total loss. There has been an arrival of the ship with the goods at their destination—the voyage has been performed, and the goods have come into the hands of the consignees; it appears that the rice which was said to be totally lost, did produce 972*l.*,"²

Lord Abinger
on this case.

"Though damaged," says Lord Abinger, "it was delivered to the consignees, and in a saleable state as rice."³

In the United
States.

The decisions of the American courts, upon the general principle that nothing short of absolute destruction will make a total loss on memorandum articles if they arrive at their port of destination, are to the same effect, or even stronger than our own. Thus, where corn insured "free from average" arrived in a putrid state at its port of destination, the Judge at Nisi Prius told the jury "that if it was so much damaged as to have become of no value for the nutriment of man," the underwriters were liable as for an actual total loss. But the Court in banc held this a misdirection, saying, "that so long as the corn physically existed there could not be a total loss, on account of damage merely;

¹ *Mason v. Skurray*, 1 Park, Ins. 253; 1 Marshall, Ins. 218, 219.

² *Glennie v. London Ass. Co.*, 2 M. & Sel. 371, 376.

The case of *Buller v. Christie* (insurance on 1950 boxes of soap), cited in 2 M. & Sel. 374, is not law. See

the English authorities here collected, and the United States case of *Morean v. United States Ins. Co.*, 3 Washington Circ. Rep. 250; 2 Phillips, Ins., no. 1762.

³ In 3 Bing. N. C. 280.

although it was good for nothing, the insurers were not liable."¹

In France, before the introduction of the new Code, when actual total loss (*perte entière*) was, by the Ordonnance de la Marine, made a ground of abandonment on perishable goods,² the question was vehemently debated, whether such a case of actual total loss could ever be said to arise when the goods arrived in species at their port of destination. Emerigon was decidedly of opinion that it could not. "I have already spoken," he says, "of the case in which a cargo of wheat arrives in port almost entirely rotten (*presque tout pourri*): I now add that even if it arrive entirely so (*quand même il le serait entier*), that is not such a case of total loss as to justify an abandonment."³ Valin⁴ and Pothier⁵ inclined to the less rigorous interpretation; and the latter even considered that the loss might be total within the meaning of the 46th Article of the Ordonnance, if the goods were damaged to half their value. The French tribunals, before the Code de Commerce, appear invariably to have supported the more rigid construction of Emerigon, that there is no total loss on perishable goods unless there has been an entire privation, or absolute destruction of them in their nature and essence (*destruction totale des effets assurés dans leur nature et essence*).⁶

From a review of all these authorities, it plainly appears that no degree of damage however great can amount to an

¹ Neilson v. Columbian Ins. Co., 3 Caines, 101, cited 2 Phillips, Ins., no. 1767.

² Ord. de la Marine, liv. 3, tit. vi. art. 56.

³ 2 Emerigon, s. xvii. s. 2, p. 215. M. Estrangin dissents from this opinion. "This doctrine," he says, "is at variance with what Emerigon himself has advanced a little before, viz., that a thing is destroyed when it has ceased to exist in species." (Quand elle cesse d'exister en essence,

see 2 Emerigon, 213.) He adds, "if wheat has become manure it certainly can no longer be said to exist in species." (Si le blé est devenu fumier il n'est certainement plus dans son essence.) Estrangin, note to Pothier, d'Assurance, p. 428.

⁴ Comment. on Ord. liv. 3, tit. vi. art. 46, vol. ii. p. 101.

⁵ Pothier, d'Assurance, no. 121.

⁶ See Estrangin, Pothier, App. 419—429. As to the present Co. de Com., see *post*, p. 1015.

actual total loss on perishable goods warranted free of average, if they arrive in species at their port of destination; in other words, the mere fact of their so arriving precludes all inquiry into the extent of the damage they have sustained, and entirely discharges the underwriter, who has stipulated by the memorandum to be exempt from liability for any loss on such goods which is not in its nature total.

Whether there can be a total loss of memorandum goods.

Mr. Arnould says,—It may still be a question, whether the loss on memorandum goods, which arrive at their port of destination, not in species, but in fact annihilated by putrefaction, is to be considered total notwithstanding their arrival? Mr. Arnould deems it better in practice to disregard all refinements, and to lay down the broad position that there can be no total loss on perishable goods, and, therefore, no claim whatever against the underwriter, who, by the memorandum, has expressly confined his liability to the case of their total loss only, unless the goods either go to the bottom of the sea, or are necessarily destroyed or justifiably sold by the assured, from the impossibility of sending them on in species to their port of destination.

It seems, however, that this very question was raised and argued by Lord Campbell whilst at the bar in *Roux v. Salvador*, and Lord Abinger, expressly delivering the judgment of the Court of Exchequer Chamber upon it, says, “It appears to us that there is no ground whatever for this assumed distinction between goods that are subject to a partial loss unconditionally, and goods excepted by the memorandum from such a loss. . . . There is neither authority nor principle for the distinction in point of law: whether a loss be total or partial must depend upon general principles. The memorandum does not vary the rules upon which a loss shall be partial or total; it does no more than preclude the indemnity for an ascertained partial loss except on certain conditions. It has no application whatever to a

total loss, or to the principle on which a total loss is to be ascertained.”¹

The legislature of France, on introducing the new commercial Code, altered that clause in the Ordonnance de la Marine which made “actual total loss” (*perte entière*) a ground of abandonment on perishable goods, and substituted instead thereof the words “loss or deterioration of the commodities insured when such deterioration or loss amounts to three-fourths.”²

M. Pardessus thus explains this provision: “The term loss (*perte*) relates to the quantity; deterioration to the quality of the things insured. The quantity lost is ascertained by measure and weight: deterioration is the change of a good into a bad quality of the same article, which may happen without any diminution of its quantity, and is estimated in its value.”³

The last editor of Valin, Monsieur Becane, writing in 1828, *i.e.*, more than twenty years after the code became the law of France, thus speaks of the change introduced by it in this respect: “Nothing can be more just than such a regulation: a deterioration so considerable is equivalent to a total loss; and, but for this rule, as an actual total loss (*perte entière*) can hardly occur except in cases of shipwreck, the underwriters might frequently have raised difficulties which the law has wisely put an end to by a safe and definite rule.”⁴

With regard to memorandum articles it is expressly provided by the Code de Commerce,⁵ “That the clause free of average shall discharge the underwriters from all liabilities from average losses, whether general or particular, except in those cases which give a right of abandonment; and in such cases the assured may choose whether he will abandon, or proceed for an average loss.”

French law as
to memorandum
articles

¹ 3 Bing. N. C. 266, 277.

² Art. 369. “Perte ou détérioration des effets assurés si la détérioration ou perte va au moins à trois quarts.”

³ Pardessus, Droit Comm., no. 846, p. 401.

⁴ Valin, Comment. sur Ord., ed. par M. Becane, 1828, vol. ii., p. 339.

⁵ Code de Commerce, art. 409.

As damage to the goods in quantity or quality to the extent of three-fourths in measure, weight, or value, is one of the express grounds of abandonment, it follows that the assured may, by the present law of France, upon abandonment, recover for a total loss on memorandum articles as well as upon any others, whenever the loss or deterioration reaches the required amount.¹

Total loss of part.

As regards the total loss of part of the cargo, it is now settled, after considerable fluctuation in the authorities, that "where memorandum goods of the same species are shipped, whether in bulk or in packages, not expressed by distinct valuation or otherwise in the policy to be separately insured, and there is no general average and no stranding, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, though consisting of one or more entire package or packages, and although such package or packages be entirely destroyed or otherwise lost by the specified perils."²

Three modes of insuring memorandum articles.

There are three cases frequently occurring in practice touching the insurance of memorandum articles:—1. Where a cargo or a quantity of memorandum articles of the same species is shipped in bulk, valued in bulk, and insured in bulk. 2. Where it is shipped in separate packages, but not expressed in the policy by distinct valuation or otherwise to be separately insured. 3. Where, being shipped in separate packages, it is expressed by distinct valuation or otherwise to be separately insured.

Hills v. London Ass. Co.

1. The first case never admitted of a reasonable doubt.

¹ Boulay-Paty, Comment. on Emerigon, c. xii. s. 46, vol. ii. p. 19.

² Judgment of the Court of Error in *Ralli v. Janson*, 6 E. & B. 422; 25 L. J. (Q. B.) 300, overruling *Davy v. Milford*, 15 East, 559, so far as the

judgment in that case was against the underwriters; the dictum of Gibbs, C. J., in *Hedburg v. Pearson*, 7 Taunt. 152; and the dicta of Abbott, J., and Holroyd, J., in *Cologan v. London Ins. Co.*, 5 M. & Sel. 456.

There can be no total loss on part of a cargo so shipped and insured. In *Hills v. The London Assurance Company*, a cargo of wheat, valued at 1600*l.*, and warranted free from average, was shipped in bulk and insured in bulk by one entire insurance. A quantity of the wheat, to the value of about 70*l.*, pumped up out of the hold into the sea during a storm and totally lost, was held not to be an actual total loss of part of the wheat, but only an average loss on the whole, for which the underwriters were not liable.¹

2. The second of these cases was for a long time doubtful, but was at length disposed of by the judgment of the Court of Error in *Ralli v. Janson*. In that case an insurance was effected by two policies on 2688 bags of linseed, valued at 1600*l.*,² "free from average," for a voyage from Calcutta to London. The ship on the voyage met with a hurricane and was driven into the Cape of Good Hope, where 1023 bags were found to be in such a state from sea-damage that a large portion of their contents was at once thrown into the sea as rotten and worthless, and the rest, which was sold on the spot, realizing only a few shillings, would, if sent on in the vessel, have lost the character of linseed before arriving in England. The remaining 1165 bags³ were brought sound to England. The question was, whether on the 1023 bags the assured were entitled to recover, notwithstanding the memorandum, as for a total loss of part of the cargo. It was held that they were not.⁴

In the United States the law, after much discussion, is the same as was thus laid down by the Exchequer Chamber. The doctrine there, as stated by Mr. Chancellor Walworth, is now that "the underwriter is not liable for any partial loss

In the United States.

¹ *Hills v. London Ass. Co.*, 5 M. & W. 569.

² The indorsement on the first policy was "per *Waban*, 2688 bags linseed, 1600*l.*;" and on the second, "per *Waban*, linseed, 1600*l.*" It was also stated in the case, though not, as

it would appear, very material, "that all the bags were of the same size and contained the same quantity."

³ Five hundred had been jettisoned in the hurricane.

⁴ *Ralli v. Janson*, 6 E. & B. 422; 25 L. J. (Q. B.) 300.

on memorandum articles unless there is a total loss of the whole of the particular species, whether the particular article is shipped in bulk, or in separate boxes or packages."¹

Separate
packages
separately
insured.

3. The third case is where a cargo is made up of separate packages, capable of distinct valuation in the outset, and the insurance appears, from the terms of the policy, to be separately effected on each distinct package; in such a case there can be little doubt that the loss will be treated as a total loss on each package lost.²

It is not unusual, therefore, in practice, to insert clauses showing that the insurance is to be distributively taken; as, for instance, "to pay average on each package as if separately insured;" or, "to pay average on each species as if separately insured."³

Entwistle v.
Ellis.

A singular attempt to vary a policy in this particular, by means of the subsequent declaration of ship and value, was properly defeated in the Court of Exchequer. It was a policy "on any kind of goods and merchandises in any ship or ships," "to be valued on rice to be declared, warranted free from particular average, unless," &c. Afterwards the policy was indorsed with this declaration: "(R) 500 bags rice per *Laidmans*, at 8s. 3d. per bag, 206l. 5s.;" and as there was a partial loss, though not under circumstances to suspend the warranty *free from average*, it was contended that the assured was nevertheless entitled to recover as for a total loss of part under this indorsement. The Court, however, gave judgment for the underwriter, holding that the intention of the policy to exclude any right to recover for an average loss could not be varied by a subsequent declaration, which by that intention was to be confined to a statement of ship, mark, and value: *Bramwell, B.*, at the

¹ In *Wadsworth v. Pacific Ins. Co.*, 4 Wendell, N. Y. R. 33, cited 2 Phillips, Ins., no. 1773; and also *Humphrey v. Union Ins. Co.*, 3 Mason, C. C. R. 426; 2 Phillips,

Ins., *ibid.*

² Per Lord Abinger in *Hills v. London Ass. Co.*, 5 M. & W. 569, 576.

³ *Stevens, Average*, 222.

same time expressing a doubt whether this declaration, in the form in which it appeared, could have had the effect-contended for.¹

4. A fourth case has arisen in our Courts: one, namely, in which the insurance is general, but on several separate articles wholly distinct in their nature. The master of a ship had insured 100% on his "effects" on board, "free from average," from Italy to England. In the course of the voyage he lost the whole by fire, except his chronometer and some other articles, and claimed as for a total loss of part. The Court of Common Pleas gave judgment for the assured, holding that the policy, by reason of the distinctly different description of articles insured under it, must be construed *divisé*; otherwise, this startling result would follow, that a man who saved the clothes he was wearing would not be able to recover for the loss of his other property.² For the same reason this Court soon after gave a similar decision in favour of the assured under a policy on "any goods," where a miscellaneous equipment of an emigrant was partially lost.³

General insurance on distinct miscellaneous articles.

In respect of freight, an insurance on that subject is, we have seen, nothing more than an undertaking that, if the shipowner is prevented from earning freight by any of the perils insured against, the underwriters on freight will make good, to the extent of their subscriptions, the loss he has thereby sustained.⁴

Total loss of freight.

To the inquiry, then, what it is that constitutes a total loss of freight, it may in general be answered that, whenever the happening of the event on which the earning of freight

¹ *Entwistle v. Ellis*, 2 H. & N. 549; 27 L. J. (Ex.) 105.

² *Duff v. Mackenzie*, 3 C. B. N. S. 16; 26 L. J. (C. P.) 313.

³ *Wilkinson v. Hyde*, 3 C. B. N. S. 30; 27 L. J. (C. P.) 116.

⁴ Per Mansfield, C. J., *Atty v. Lindo*, 1 B. & P. N. R. 240; per Cranworth, L. C., *Scottish Marine Ins. Co. v. Turner*, 1 Macq. House of Lords, 334.

depends is rendered absolutely impossible, or, in any practical sense, utterly hopeless, by means of the perils insured against, this is a case of actual total loss. The question, therefore, turns in some measure on the nature of the contract under which freight is payable.

If the freight insured be the hire of a ship for an entire voyage payable, under the terms of a charter-party, only on condition of the arrival of that particular ship at the port of destination, and such arrival be rendered impossible or hopeless, *e. g.*, by her foundering at sea, or being justifiably sold in the course of the voyage as irreparable, this ought, on principle, to be a total loss on freight, quite irrespective of all questions as to the state of the cargo.

Where, on the other hand, the earning of the freight insured is not thus made to depend on the arrival of the ship under the charter-party, but on the delivery of the goods according to the terms of the bill of lading, the chance of the ship's arrival would seem to be less important as the criterion of the right to recover a total loss on freight without notice of abandonment, than the chance that the goods may be forwarded, so as to earn freight by another ship:¹ in such cases, accordingly, although the original ship be wholly destroyed, or justifiably sold as irreparable, since the cargo, if saved, may be sent on, so as to earn freight, by a substituted ship, it would seem that the assured, in order to recover as for a total loss on freight, ought, on principle, to give notice of abandonment.

Transshipment
under the
policy.

But instead of giving notice of abandonment, and surrendering the cargo at an intermediate port, the assured may prefer to send on the goods by another vessel to the port of destination, and so fulfil his contract; and if he do so, he may then come against the insurers under the "sue and labour" clause for the whole expense of transshipping and sending on the cargo, including the freight of the substituted

¹ *Shipton v. Thornton*, 9 A. & E. 314; *Mathews v. Gibbs*, 30 L. J. (Q. B.) 55.

vessel, as being the expense of preventing a loss of the whole of the freight, which would otherwise have fallen upon the insurer.¹

We are here, however, dealing with the question of total loss of freight, in its nature at once absolute. An inquiry which we have twice gone through in what precedes of this treatise, must necessarily be made and determined in each of these cases, namely, whether at the time of the casualty the risk on freight had then commenced,² whether the freight or chartered hire was at that time become an insurable interest;³ whether, in fact, there had already accrued an inchoate title to the subject insured. We do not mean to repeat here what has been said elsewhere on that question, nor obscurely or incorrectly to abbreviate it. Preliminary questions.

Assuming, then, that there was at the time of the casualty an inchoate title to the freight or chartered hire, there appears to be at least two classes of cases in which the total loss on that interest is absolute at once. Classification.

The first is that where the vessel is totally lost before she has put any of the cargo on board, and the contract of affreightment does not allow another vessel to be substituted.⁴ First.

The second is that where both ship and cargo perish totally by the same casualty. Each of these classes comprises freight properly so called, and also chartered hire. Second.

A third class is that in which the master justifiably sells his cargo at an intermediate port, and the policy is such as enables him to recover the whole of the freight for the cargo so sold, giving up to the insurer any freight earned on the same voyage subsequently to the sale. Third.

A fourth class may be that in which the ship and cargo are separated by the loss or sale of the ship under such Fourth.

¹ *Kidston v. Empire Mar. Ins. Co.*, L. R. 1 C. P. 535.

² *Ante*, p. 432.

³ *Ante*, p. 65.

⁴ *Rankin v. Potter*, L. R. 6 Ho. of Lds. (E. & I.) 83. There is clearly

a total loss under a policy on disbursements if the ship by sea-perils is rendered incapable of earning freight; *Currie v. Bombay Native Ins. Co.*, L. R. 3 P. C. 72.

circumstances that the completion of the voyage even by a substituted ship is impracticable.

A fifth class may be where sea perils prevent the ship from loading the agreed cargo, except after such a delay as would frustrate the commercial objects of the affreightment, and the freighter rescinds the contract.¹

A sixth class frequently occurs in relation to perishable cargo loaded in bulk under charter-party in which it is stipulated that—if any portion of the cargo be delivered sea-damaged, the freight on such sea-damaged portion to be two-thirds of the charter-party rate:—and the shipowners effect a policy—to cover only the one-third loss of freight in consequence of sea-damage as per charter-party. There it is held that if the cargo be delivered sea-damaged in whole or in part, the insurers are liable for one-third freight of the sea-damaged cargo, being an average or a total loss according as the sea-damage extends to part or to the whole of the cargo.²

Loss not by
perils insured
against.

One thing expressly assumed throughout this section is too important to be passed without further notice,—that the loss is by perils insured against. If the loss of freight be by other than the perils insured against, there is no claim against the underwriter.³ If, therefore, the master, with commendable prudence, sell the cargo at an intermediate port as the best to be done for those concerned,⁴ *a fortiori* if he sell it imprudently,⁵—if he sail to a distant port for repairs of sea-damage which cannot be effected there, and, to avoid further loss of time, prudently sail home partially or wholly unloaded,⁶—or if the owner after freight earned abandon his ship in port as not worth repairing, in consequence of injuries sustained during the voyage, and the

¹ Jackson v. Union Marine Ins. Co., L. R. 1 C. P. 572; Tully v. Howling, 2 Q. B. D. 182; on appeal, *ibid.* 186.

² Griffiths v. Bramley Moore, 4 Q. B. D. 70.

³ Per Lord Truro, Scottish Mar. Ins.

Co. v. Turner, 1 Macq. H. of Lds. C. 340.

⁴ Mordy v. Jones, 4 B. & Cr. 394; Vlierboom v. Chapman, 13 M. & W. 230.

⁵ Hunter v. Prinsep, 10 East, 378.

⁶ Philpott v. Swann, 11 C. B. N. S. 270.

freight is thereby transferred to the abandonees of ship,¹—in all these cases there is a loss of freight to the owner, but by other causes than those insured against; and, besides, in the last of them the occasion for an indemnity never arose, as the freight had been earned.

In a policy on profits the underwriter engages that the goods shall not be prevented by the perils insured against Profits and Commission. from so arriving as to earn a profit. If, then, the goods are so prevented from arriving, there is a total loss on the expected profits, irrespective of any notice of abandonment. Commissions stand upon the same footing as profits; and, as in either case the assured could assign nothing by abandonment, no notice of abandonment is required.

¹ Scottish Mar. Ins. Co. v. Turner, 1 Macq. H. of Lds. C. 334.

CHAPTER VIII.

CONSTRUCTIVE TOTAL LOSS.

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As we are now about to consider the subject of total loss under a modified title, it is proper here to state that a constructive total loss is equally a total loss in law as an actual total loss, and is therefore equally within the intent and meaning of a policy against "total loss only,"¹ except it be a policy on bottomry.²

General doc-
trine of con-
structive total
loss.

A constructive total loss in Insurance Law is such a loss as entitles the assured to claim the whole amount of the insurance, on giving due notice of abandonment.

¹ Adams v. M'Kenzie, 13 C. B. N. S. 442.

² Broomfield v. Southern Ins. Co.,

L. R. 5 Ex. 192; Stephens v. Broomfield, L. R. 2 P. C. 516; Thompson v. Roy. Ex. Ass. Co., 1 M. & Sel. 30.

Generally speaking, that is a case of constructive total loss Definition. where the thing insured has been reduced to such a state, or placed in such a position by the perils insured against, as to make its total destruction or annihilation, though not inevitable, yet highly imminent, or its ultimate arrival under the terms of the policy, though not utterly hopeless, yet exceedingly doubtful.

The thing insured may not be absolutely destroyed, or irretrievably lost; "there may, however, be a capture, which, though *prima facie* a total loss, may be followed by a recapture which would revest the property in the assured. There may be a forcible detention, which may either speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination.¹ There may be some other peril which renders the ship innavigable, without any reasonable hope of repair; or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them, or what remains of them, to their destination."²

In all such cases, the assured, if he wishes to recover as Notice of abandonment. for a total loss, must, as a condition to the right of so doing, give due notice of abandonment. Such a notice is an explicit³ intimation to the underwriters that he offers to cede or abandon to them unconditionally his whole interest⁴ in the thing insured or the remains of it, as far as it is covered by the policy. This notice he must give within a reasonable time.⁵

Having done this, his right to recover as for a total loss Conditions of recovering as for a total loss. depends, in English law, upon the question whether the state of things which entitled him thus to give notice of

¹ "In matters of business," says Maule, J., "a thing is said to be impossible when it is not practicable, and a thing is impracticable when it can only be done at an excessive and unreasonable cost;" *Moss v. Smith*, 9 C. B. 103.

² Per Lord Abinger, C. B., 3 Bing. N. C. 266, 286.

³ *Thellusson v. Fletcher*, 1 Esp. 72; *Parmeter v. Todhunter*, 1 Camp. 541.

⁴ Ante, p. 954.

⁵ Ante, p. 960.

abandonment continued down to the time of bringing the action. In other words, there are two main questions to be considered in every case of constructive total loss: 1. Was the state of things such as, *primâ facie*, to entitle the assured, on receiving intelligence thereof, to give notice of abandonment? 2. Did it continue such down to the time of action brought, as to entitle him to follow up that notice and recover as for a total loss?

Upon what intelligence assured may abandon.

The first question then is, upon what kind of intelligence the assured may justifiably give notice of abandonment. He has, *primâ facie*, a right to give such notice on receiving intelligence of any such marine casualties as those just referred to, which, though they do not involve the absolute destruction or irretrievable loss of the thing insured, yet render its destruction highly probable, or its ultimate recovery very doubtful. These are the only kind of casualties which can justify a notice of abandonment; no amount of damage, however great, which does not threaten the entire destruction of the thing insured,¹—no amount of difficulty in regaining possession of it, which does not involve an absolute privation for the time of ownership, or alienation of property,²—can make a case of constructive total loss. “The assured cannot elect to turn what, at the time when it happened, was only an average loss, into a total one by abandoning.”³ “There is no instance,” says Buller, J., “where the owner can abandon, unless at some period of the voyage there has been a (constructive) total loss.”⁴ “There is not any principle,” says Lord Ellenborough, “which authorizes abandonment, unless where the loss has been actually total, or in the highest degree probable, at the time of the abandonment.”⁵

¹ *Cazalet v. St. Barbe*, 1 T. R. 187; *Furneaux v. Bradley*, 1 Park, 365.

² *Thornley v. Hebson*, 2 B. & Ald. 513.

³ Per Lord Mansfield in 2 Burr. 697.

⁴ 1 T. R. 191. The learned Judge

uses the term “total loss,” without qualification, but the whole tenor and language of his judgment shows that he was speaking of a technical or constructive total loss.

⁵ Per Lord Ellenborough in *Anderson v. Wallis*, 2 M. & Sel. 240.

Supposing, however, the case to be such as *prima facie* to justify the assured in giving notice of abandonment, he is not bound, before giving it, to wait for full and accurate information, but may give it at once, provided the report be sufficiently probable.¹ "In cases like these," says Lord Ellenborough, "men must act upon probable information, and leave the effect of their acts to be determined by the eventual truth or falsehood of the intelligence they receive. If I hear of my ship's being taken in the East or West Indies I am not obliged to wait till I certainly know the event by the testimony of those who were present. Provided the event has once existed, what I do, believing it to have taken place, must be valid and effectual."²

Notice may be immediately after hearing.

Of course, if it turns out that the intelligence upon which the assured acted, in giving notice of abandonment, was totally false and unfounded, the notice of abandonment is entirely inoperative; in fact, is a mere nullity.³ "The effect of an offer of abandonment," said Lord Ellenborough, "is that, if it appears to have been properly made upon supposed facts, which turn out to be true, the assured has put himself in a condition to insist on his abandonment. But it is not enough that it was made properly on assumed facts, if it turn out that none such existed: it may be said to be properly made upon notice, received and *bonâ fide* credited by the assured, of his ship having been wrecked, whether such intelligence were true or not, and although the letter conveying it turn out to be a forgery; yet clearly no right of action would vest in him, founded upon an abandonment

If made on false intelligence.

¹ Bainbridge v. Neilson, 1 Camp. 237. In the United States a report in a newspaper, provided it is not vague and imperfect, has been held a sufficient foundation for notice of abandonment, Bosley v. Chesapeake Ins. Co., 3 Gell & Johnson's Rep. 450; see 2 Phillips, Ins., no. 1666.

² Per Lord Ellenborough in Bainbridge v. Neilson, 1 Camp. 237, 240.

³ Le délaissement fait par erreur ne

produit aucun effet, lorsque l'erreur tombe sur quelqu'une de ces choses qu'il faut connaître pour opérer un abandon régulier et valable, comme si la nouvelle de l'accident se trouvait fausse; 2 Emerigon, c. xvii. s. 6, p. 233. "If an abandonment has been made where there has been no capture, it, of course, goes for nothing:" per Lord Ellenborough, 1 Camp. 240.

made on false intelligence. If the facts be all imaginary and founded on misconception, the whole foundation of the abandonment fails."¹

True intelligence, sufficient facts.

In order to make a notice of abandonment valid, not only must the information on which it is founded prove true, it must also be justified by the state of facts existing at the time when it is actually given. Even though the facts upon which it was founded were truly reported, and were in themselves such as to justify the assured in giving notice of abandonment, yet, if they have ceased to exist before the time at which such notice was given, it will have no force or effect whatever. Before the assured had given notice of abandonment, his ship, which he heard of being captured, had, in fact, been recaptured, though not to his knowledge; the Court held that it was entirely inoperative, for an abandonment could be made only according to the facts at the time of making it.² Lord Ellenborough said, that to "give effect to such a notice of abandonment would grievously enlarge the responsibility of the underwriters; it would be to make them answerable, not for the actual loss, but for a supposed total loss, which had, in fact, ceased to exist."³

Foreign law.

The law in the United States, and also in France, is in this respect the same with our own.⁴

Sufficient also at the time of action brought.

2. But, even though the intelligence may have been true, and the state of things, at the time the notice was given, such as to justify its being given, yet the undoubted doctrine of the English law is, that the right of the assured, after having given such notice, to recover as for a total loss, depends entirely on the state of things as they exist at the time of action brought. If before the commencement of the action the thing insured be recaptured or otherwise recovered, so that taking everything into account, what

¹ *Bainbridge v. Neilson*, 1 Camp. 237, 240.

² *Bainbridge v. Neilson*, 10 East, 329; *Parsons v. Scott*, 2 Taunt. 363;

Falkner v. Ritchie, 2 M. & Sel. 290.

³ 10 East, 341.

⁴ 2 Phillips, Ins., no. 1662; 3 Pardessus, Droit Comm., p. 233.

remains is clearly nothing more than an average loss, this defeats his right to recover as for a total loss.¹ Lord Tenterden, in the latest case in which the point was mooted, thus states the law as now understood in this country: "The abandonment is to be viewed with regard to the ultimate state of facts as appearing before the action brought, according to the opinion of the Court in *Bainbridge v. Neilson*. Doubts were expressed as to the propriety of that decision by very high authority (Lord Eldon) in *Smith v. Robertson*;² but, notwithstanding those doubts, the rule as laid down in *Bainbridge v. Neilson*, was adopted in the two subsequent cases of *Patterson v. Ritchie*,³ and *Brotherston v. Barber*.⁴ We consider the point to have been well settled, and the rule established by these authorities."⁵

Lord Mansfield states the doctrine, and gives the reason for it in these words: "The plaintiff's demand is for an indemnity. His action then must be founded upon the nature of his damnification, as it really is, at the time the action is brought."⁶ Reason for this.

This doctrine of the English law differs, as we have already intimated, from that of the Continent, and of the United States. In France the law is now fixed by the Code de Commerce, which declares⁷ that no abandonment can operate as an irrevocable transfer of property, unless it be, 1, accepted; or, 2, adjudged to be valid.⁸ Boulay-Paty thus explains the meaning and effect of this provision of the Code:—"An acceptance by the underwriter waives any defect in the grounds of the abandonment;" the judgment of the Court In France.

¹ See the cases cited in the next section. *Bainbridge v. Neilson*, 10 East, 329; *Patterson v. Ritchie*, 4 M. & Sel. 393; *Brotherston v. Barber*, 5 M. & Sel. 418; *Naylor v. Taylor*, 9 B. & Cr. 718.

² 2 Dow. 474.

³ 4 M. & Sel. 393.

⁴ 5 M. & Sel. 418.

⁵ 9 B. & Cr. 718, 724.

⁶ *Hamilton v. Mendes*, 2 Burr.

M.

1198, 1210.

⁷ Art. 385.

⁸ "That is," says Boulay-Paty, "ascertained by the judgment of a court of law or tribunal of commerce, to have been made in respect of some one of those casualties which are specified in the Code, as alone authorizing an abandonment:" 4 Boulay-Paty, Droit Comm. Mar. 377.

decides that good grounds existed for it at the time it was made:—if before the abandonment is thus “adjudged to be valid,” the thing insured should be restored, the right of the assured to insist on his abandonment is not thereby defeated; for the judgment, when given, has a retrospective effect, and, if it be in favour of the validity of the abandonment, the underwriters are presumed to have acquired the proprietorship of the thing insured from the moment the abandonment was first notified to them.¹

By the existing law of France, then:—1. An abandonment once well made on good grounds is indefeasible, whether it have been accepted or not; 2. If accepted, it is indefeasible, whether it have been made on good grounds or not.

In the United States.

The law as thus explained prevails also in the United States of America. The facts, as they exist at the time when a notice of abandonment is given, must be such as to justify it; but if they be such, then the rule is, that an abandonment once rightfully made is binding and conclusive between the parties, and the rights flowing from it become vested rights, and are not to be divested by any subsequent events, other than the consentaneous acts of both parties.²

These questions have been so fully considered in a previous chapter,³ that with this mention of them, we proceed to a review of the cases of constructive total loss in relation to the three main subjects of insurance,—Ships, Goods, and Freight, separately considered.

On ship in case of capture, or desertion at sea.

The best general statement I have anywhere found of the circumstances that confer on the assured on ship a *prima facie* right to give notice of abandonment, is contained in the following passage from the judgment of Story, J., in the American case of *Peele v. The Merchants' Insurance*

¹ 4 Boulay-Paty, 377. See also 3 Pardessus, Droit Comm. 424.

² *Peele v. Merchants' Ins. Co.*, 3

Mason's Circuit Rep. 27; 3 Kent, Comm. 324; 2 Phillips, no. 1705.

³ Chap. vi. ante.

Company:¹—"The right of abandonment has been admitted to exist, where there is a forcible dispossession or ouster of the owners of the ship, as in cases of capture, &c. ;—where there is a restraint or detention which deprives the owner of the free use of his ship, as in cases of embargoes, blockades, and arrest ;—where there is a present total loss of the physical possession and use of the ship, as in cases of submersion ;—where there is a total loss of the ship for the voyage, as in cases of shipwreck, so that the ship cannot be repaired in the port where the disaster happens ;—where the injury is so extensive, that by reason of it the ship is useless, and the repairs would exceed her value." We will consider the different cases somewhat in the same order.

The assured on ship has a right to give notice of abandon- Capture.
ment, immediately he hears that his vessel has been forcibly taken out of his possession and control by capture. "The ship," as Lord Mansfield says, "is lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy."² And having given notice of abandonment, he may insist on the abandonment, and recover as for a total loss, "provided the capture, and the total loss occasioned thereby, continue to the time of bringing the action."³

If, however, before action brought, the ship be recaptured and restored to the possession or control of her owners, either undamaged or only partially damaged, the assured cannot recover as for a total loss, even though the loss was total at the time he gave such notice. The principle of the English law is, "that the nature of the damnification at the time of action brought is the sole criterion of the right to recover as for a total loss."⁴

Ship and cargo insured from Virginia to London, were captured on the 6th of May, recaptured on the 23rd, and on
Hamilton v. Mendes.

¹ Mason's Rep. 27.

v. Mendes, 2 Burr. 1212.

² In 2 Burr. 694; 2 Emerigon, c. xvi. s. 2, p. 212.

⁴ Per Lord Ellenborough in 4 M. & Sel. 583.

³ Per Lord Mansfield in Hamilton

the 3rd of June were brought into Plymouth. Twenty days after her arrival in Plymouth, the assured, who then first heard both of the capture and recapture, gave notice of abandonment, which the underwriters refused to accept. On the 19th of August (before action brought) the ship and cargo were brought into the port of London, the ship having received no damage from the capture, and the cargo being delivered to the freighters on payment of full freight. Lord Mansfield held that, upon the above facts, the assured could not recover as for a total loss:¹ "the plaintiff's demand," said his lordship, "is for an indemnity. His action, then, must be founded on the nature of his damnification as it really was at the time of action brought. It is repugnant on a contract of indemnity to recover as for a total loss when the final event has determined that the damnification is in truth an average loss."²

There was nothing at all here to justify the notice when given; but even if the assured had, at the time, only heard of the capture, the subsequent recapture and restoration of the ship in a comparatively undamaged state, before action brought, would have prevented the assured recovering for a total loss.³

Bainbridge v.
Neilson.

The assured on the 30th September heard of the capture of his ship which had taken place on the 21st, but not of the recapture, which had been effected on the 25th, and gave notice of abandonment, which the underwriters did not accept. Before action brought, the ship was restored to his possession in an Irish port, and after action brought, she arrived at Liverpool undamaged and earning freight; the salvage charges on ship being about 15% per cent. on the sum insured, and on the freight about 13% per cent. Lord Ellenborough and the Court of King's Bench unanimously held that the assured could only recover for an average loss.⁴

¹ *Hamilton v. Mendes*, 2 Burr. 1198.

² 2 Burr. 1210.

³ *Bainbridge v. Neilson*, 10 East, 329; *Parsons v. Scott*, 2 Taunt. 362;

Naylor v. Taylor, 9 B. & Cr. 718.

⁴ *Bainbridge v. Neilson*, 10 East, 392; see also *S.P.*, *Naylor v. Taylor*, 9 B. & Cr. 718; 4 M. & Ryl. 526; *S.C.* at N. P., *Dans. & Ll.* 240.

Even where the real state of facts is such as to justify an abandonment at the time of giving notice, subsequent restoration of the property, before action brought, defeats the claim for a total loss.¹ In the earliest case, goods insured from Liverpool to Quebec were captured with the ship on the 27th September, and not recaptured till the 27th October; in the interim, viz., on the 13th of October, the assured, who then first heard of the capture, gave notice of abandonment, which the underwriters refused to accept. Ultimately, and before action brought, the ship, with the goods on board, arrived at Quebec, earning freight, and the Court held that the assured could only recover on the goods for an average loss to the extent of the sea damage and salvage charges.²

Patterson v.
Ritchie.

Capture is *prima facie* a total loss; recapture and restoration, however, of the ship, before action brought, do not necessarily prevent the loss being total. If the ship after recapture be at the time of bringing the action in such a state that, if no notice of abandonment had been previously given, the assured might at that moment abandon, he may recover as for a total loss, notwithstanding the existence of her mere hull.³

The effect of
restoration
may be nulli-
fied by the
condition of
the ship.

¹ Patterson v. Ritchie, 4 M. & Sel. 393; Brotherston v. Barber, 5 M. & Sel. 418, confirmed in Naylor v. Taylor, 9 B. & Cr. 718, 724.

² Patterson v. Ritchie, 4 M. & Sel. 393. In this case Lord Ellenborough said, "Although Lord Eldon is stated to have spoken with dissatisfaction of Bainbridge v. Neilson in the House of Lords, I confess, with all deference, I am unable to see any good reason for receding from that judgment":—and Bailey, J., observed, "It appears to me that the plaintiff can only recover in respect of that which constituted a loss at the commencement of the action." See the passage from Lord Tenterden's judgment in Naylor v. Taylor, 9 B. & Cr. 724, already

cited, ante, p. 1029, approving and confirming the rule of Bainbridge v. Neilson.

³ Lord Mansfield (Hamilton v. Mendes, 2 Burr. 1209) says, "It does not necessarily follow that because there is a recapture, therefore the loss ceases to be total. If the voyage is absolutely lost, or not worth pursuing [see next page]—if the salvage is very high—if further expense is necessary—if the insurer will not engage, in all events, to bear that expense, though it should exceed the value or fail of success;—under these and many other like circumstances, the assured may disentangle himself and abandon, notwithstanding there has been a recapture."

As far as concerns the ship, therefore, the question in all cases of restoration following upon capture or other forcible privation, is whether the state of the ship, subject to the salvage expenses at the time of commencing the action, was such that the assured might then have treated the case as one of constructive total loss. If so, he is in that case entitled, notwithstanding restoration, either to follow up a previous notice of abandonment, or, hearing at one and the same moment of the loss and restoration, then, for the first time to give notice, and, in either case, to recover as for a total loss. The main difficulty is in determining for that purpose in what state the restored ship must be.

Loss of the
voyage.

Lord Mansfield, in considering this question, gave great weight to what he was pleased to term *Loss of the voyage*.¹ That is a phrase of very pertinent meaning in relation to wager policies which were no other than wagers in the form of policies on the issue or success of the voyage.² In *Pole v. Fitzgerald*, a case upon an interest policy, this point was raised, and Willes, C. J., delivering the judgment of the Court of Error then for the first time laid it down, that in all policies on ship (not being wagers) the insurance is not on the voyage, but on the ship for the voyage, and that in all cases of loss under such policy the question never is, what damage has the assured sustained by the interruption of the voyage,—but, how much damage is done to the ship? This decision was affirmed in the House of Lords;³ but Lord Mansfield, notwithstanding, adhered through a long series of decisions to the loss of the voyage

¹ See preceding note.

² *De Paiba v. Ludlow*, Comyn's Rep. 360; *Pond v. King*, 1 Wils. 191; *Dean v. Decker*, 2 Str. 250; *Whitehead v. Bance*, 1 Park, Ins. 165. The cases of *Asseviedo v. Cambridge*, 10 Mod. 77, and *Spicer v. Franco*, before Lord Hardwicke, A.D. 1736, seem *contra*; but the former

was never decided, and the latter turned mainly on another point. See these cases commented on by Lord Mansfield, 2 Burr. 695.

³ *Pole v. Fitzgerald*, Willes, 641, affirmed in the House of Lords by eight judges against three; see *S. C.*, *Fitzgerald v. Pole*, 5 Brown, P. C. 131.

as a test of the loss of the ship.¹ Through the whole time that he presided in the King's Bench, and indeed long afterwards, this seems to have continued to be the recognized doctrine of the Courts.² One of the first cases in which there was a return to the doctrine of the House of Lords in *Fitzgerald v. Pole* was that of *Parsons v. Scott*,³ which came before the Court of Common Pleas in 1810; and four years afterwards the case of *Falkner v. Ritchie* was decided in the same way by the Court of King's Bench, then presided over by Lord Ellenborough.⁴ From this period, the law on the point may be considered as settled. The loss of the voyage has nothing to do with the loss of the ship.⁵

The same principle has received abundant judicial illustration, and may be regarded as conclusively established, in the insurance law of the United States.⁶

"Loss of voyage" being thus withdrawn as an element for consideration, the rule of law as to what shall be the condition and circumstances of the ship on restoration at the time of action brought, so as to have the effect of then defeating the right of action for a total loss, has been laid down and frequently reaffirmed in the following terms:—"The ship, after recapture, must be *in esse* in the country of the owner, under such circumstances that he may, if he

Rule as to ship's condition on restoration.

¹ *Goss v. Withers*, 2 Burr. 683; *Hamilton v. Mendes*, *ibid.* 1198; *Milles v. Fletcher*, 1 Dougl. 231a.

² See *Cazalet v. St. Barbe*, 1 T. Rep. 187, in which Buller, J., says, "If either the ship or the voyage be lost, that is a total loss." So again in *Rotch v. Edie*, 6 T. Rep. 413 (temp. Lord Kenyon), in a case of abandonment on detention, the same doctrine was held, viz., that it was a total loss on ship, because the voyage was lost, and the whole adventure frustrated.

³ *Parsons v. Scott*, 2 Taunt. 363.

⁴ *Falkner v. Ritchie*, 2 M. & Sel. 290; and by Lord Eldon in *Brown v. Smith*, 1 Dow's P. C. 359; by Lord Tenterden in *Doyle v. Dallas*, 1 Mood. & Rob. 55.

⁵ See *Naylor v. Taylor*, in *Danson & Ll.*, and note, 248, 254.

⁶ *Bradlie v. Maryland Ins. Co.*, 12 Peter's Sup. C. R. 400; *Hurtin v. Phoenix Ins. Co.*, 1 Washington's C. C. R. 400; *Alexander v. Baltimore Ins. Co.*, 4 Cranch's Sup. C. R. 370; 2 Phillips, Ins., no. 1521, 1522, 1523.

pleases, take possession of her, and may reasonably be expected to do so."¹

McIver v.
Henderson.

A ship, insured from Liverpool to the African coast, was captured by the French, who, after taking out her captain and most of her crew, and plundering her guns, stores, furniture, provisions, and register, gave her up in that state to the master of a Portuguese prize, which they had previously taken, and, at the same time, put on board of her again the English captain and part of the original crew. The ship being left at sea thus manned and very badly provisioned, the Portuguese captain bore up for Fayal (Western Islands), and, on arriving there, claimed the ship, and what remained of the cargo, as a gift from the French captors. The English captain resisted this claim, and the Prize Court of Fayal decided in his favour, subject to an appeal, pending which, by selling what remained of the cargo, and depositing the proceeds to abide the event of the appeal, he obtained the release of the ship, and arrived with her at Liverpool before action brought.

The ship, as she lay at Liverpool, was still in an entirely dismantled condition, but worth, to be sold as she lay, 1300*l*. (her value in the policy being 3000*l*.); the expense of bringing her from Fayal had been 221*l*.; the sum left there to abide the event of the appeal was 427*l*.; the appeal was still pending, and, in the event of its being decided against the assured, he would have lost his deposit and been condemned, besides, in damages to an indefinitely larger amount. Under these circumstances, the assured, who had given notice of abandonment, on first hearing of the capture and before the ship's liberation, insisted on his right to recover, in respect of such notice, as for a total loss; and the Court of King's Bench gave judgment in his favour.²

¹ By Bayley, J., in *Holdsworth v. Wise*, 7 B. & Cr. 799; afterwards per Lord Campbell in *Lozano v. Janson*, 28 L. J. (Q. B.) 337, 342; 2 E. & E. 100; and in *Dean v. Hornby*, 3 E. & B. 190.

² *McIver v. Henderson*, 4 M. & Sel. 576.

Lord Ellenborough said, "The mere restitution of the hull of the ship, if the assured may eventually have to pay more for it than it is worth, is not a circumstance by which the totality of the loss is reducible to an average one. If no abandonment had been already made, do not sufficient circumstances exist in this case to justify an original abandonment at the present moment? It appears to us that there existed at the time of the abandonment, at the time of action brought, and that there exist at the present moment, circumstances fully sufficient to entitle the plaintiff to recover as for a total loss."¹

A slave ship, insured from Liverpool to the coast of Africa, and thence to the West Indies, was, in the course of her voyage, mutinously seized and run away with by her crew, but was subsequently boarded and taken possession of by a British man-of-war, and brought into Barbadoes. The government agent there, in the absence of the master, and without waiting for orders from England, sold the whole of the cargo and stores that still remained on board the ship, in order to pay the salvage, leaving nothing but the hull and rigging. The House of Lords held that, under these circumstances, the assured (who, immediately on hearing these facts, had given notice of abandonment, and sent out orders to sell the ship), was entitled to recover as for a total loss.²

A case of derelict so closely resembles in point of law the case of privation by capture, that, as an illustration, the following instance is given:—A ship, insured from Belfast to her port or ports of loading in British America, and thence back to her port of discharge in the United Kingdom, whilst on her homeward passage received so much damage from

¹ Lord Ellenborough, indeed, in the course of his judgment, referred to other considerations, which, as pointed out in *Dans. & Ll.* 252, show that his lordship had not quite "pu-

rified his mind of the generalities" that he reprobates in *Falkner v. Ritchie*.

² *Brown v. Smith*, 1 Dow's P. C. 349.

Brown v. Smith.

Holdsworth v. Wise.

tempestuous gales, that the crew quitted her and went on board another vessel. Immediately on receiving this intelligence the plaintiff gave notice of abandonment. The day after the crew had left her, the ship was picked up at sea by a third vessel, the captain of which put some men on board of her, and ultimately succeeded in bringing her into New York, where, on arrival, she was taken possession of by the British consul, and with his sanction, but without any authority from the assured, was repaired on bottomry by the agents for Lloyd's in that city. The ship, thus repaired, was brought to Liverpool before action, but was immediately taken possession of on behalf of the lenders on bottomry for 1200*l.*, there being besides an additional charge of 850*l.* on her for the estimated cost of repairing further damage received in the Mersey just before reaching Liverpool. The joint amount of these two sums exceeded the value in the policy. Under these circumstances the Court held, that the loss which had once been total by the desertion of the crew, and in respect of which the assured had given due notice of abandonment, was not turned into a partial loss by the subsequent events, the effect of which could be of no benefit to the assured.¹

Chapman v.
Benson.

In the above case the repairs abroad for which the ship was bottomried had been done by strangers without the authority of the assured; had they been done by his direction, or by the master acting as his agent at the foreign port, then the fact of the ship's arrival would, as it seems, have precluded a recovery for a total loss, though the amount of the bottomry bond and expenses together exceeded the worth of the ship to her owners as restored.²

Even the *prima facie* right to abandon in respect of capture, seizure, desertion, or other privation of property or possession, whether forcible or not, is dependent on there having been,

¹ Holdsworth v. Wise, 7 B. & Cr. 794.

² Chapman v. Benson, 5 C. B. 330; 2 H. of Lds. Cas. 696; Fleming v.

Smith, 1 H. of Lds. Cas. 513, 533. See the ground of this stated in Rosetto v. Gurney, 11 C. B. 176.

at some one period of time during the risk, a total loss by the complete and actual privation of the owner's possession or control of the ship.

The ship *William*, of New York, insured in this country, from Hull to New York, met with such tempestuous weather, and became so leaky, that the crew exhausted at the pumps deserted her at sea to save their lives, and were taken on board the brig *Hyder Ali*. At the same time, eight men of *The Hyder Ali*'s crew were allowed to board *The William* in the hope of ultimately bringing her into port. *The Hyder Ali* reached New York in safety, and the owners of *The William*, who resided there, immediately sent orders to their agents in England to give notice of abandonment to the underwriters, which was given accordingly, but not accepted. Meanwhile, only two days after *The Hyder Ali*'s arrival at New York, *The William* was brought by the eight seamen into Newport, Rhode Island (a harbour about two hundred miles from New York), and there, with the knowledge of the owners, who did nothing to prevent the proceeding, was sold to pay the salvage, which amounted to about two thirds of the price she sold for. The Court, on the whole of the above circumstances, held, that the assured could not insist on their notice of abandonment, and recover as for a total loss. The ship had never been out of their possession and control, as the eight seamen who boarded her as salvors directly she was left by the original crew were to be regarded as their agents; she was, moreover, restored to them after notice of abandonment, under such circumstances, that they might have had possession of her again if they pleased, and might reasonably have been expected to take it; and their title was not improved by permitting the salvors to have recourse to a sale which was not necessary, and therefore not justifiable.¹

The principle of these cases has been accepted by the Courts in determining others of more recent date. Thus,

Thornely v.
Hebson.

Dean v.
Hornby.

¹ Thornely v. Hebson, 2 B. & Ald. 513.

in *Dean v. Hornby*, the ship, insured in a time policy, had during the currency of the policy been captured by pirates and recaptured by a British ship of war, and whilst on her way to England under a prize crew, was obliged by sea damage to refit at Monte Video, and again to put into Fayal, where the prize master sold her (it was admitted) without justifiable cause. Though she afterwards came to England, and was adjudicated to her owners by the Court of Admiralty, this part of her history formed no part of the case submitted to the Court of Queen's Bench, where the assured who had abandoned after expiration of the policy, but immediately on receipt of news of her capture, were held entitled to recover as for a total loss.¹

Lozano v. Janson.

Again, in *Lozano v. Janson*, the ship while on the coast of Africa was seized by a British cruiser, carried to St. Helena, and there condemned by the Vice-Admiralty Court for being engaged in the slave trade. The cargo, which was the subject of insurance, was also condemned, unloaded, and stored in St. Helena, to abide the results of an appeal to the Privy Council. The taking was unlawful, the charge being unfounded. But the assured, who had abandoned within proper time, were held entitled to recover, as their property, though in existence, never after had been placed "under such circumstances that if they pleased they might have had possession, and might reasonably have been expected to take possession of it."²

Arrest, detention, embargo.

Subject to the same limitations, there can be no doubt that arrest, detention, or embargo of the ship, whether by a hostile or friendly government, gives a *prima facie* right of abandonment in all cases where there is an apparent probability that the owner's loss of the free use and disposal of

¹ *Dean v. Hornby*, 3 E. & B. 180. In *Kleinwort v. Shepard*, 1 E. & E. 447; 28 L. J. (Q. B.) 147, the only question was whether *capture* or *seizure* was the term in the policy

that covered a taking of the ship by coolie passengers.

² *Lozano v. Janson*, 2 E. & E. 100; 28 L. J. (Q. B.) 337.

his ship, at one time total, by the arrest or embargo, may be of long or, at all events, of very uncertain continuance.

Thus, where the ships of an American merchant, resident *Rotch v. Edie*, in this country at the time of action brought, had been seized and detained by the French government in their port of loading, it was held, that under a policy at and from such port, he might recover as for a total loss, upon due notice of abandonment, more especially as it appeared that the ships, at the time of action brought, were still detained, and had then been so for three years.¹

Of course, if the arrest creates only a temporary obstruction of the voyage, without giving rise to any permanent loss of control over the ship, it cannot give any right to abandon. Thus where, on the occasion of a famine at Corfu, some Venetian cruisers meeting at sea a Genoese ship laden with corn, carried her into Corfu, and, after taking out and paying for the corn, let the ship go free, this was decided in the Rota Court of Genoa to afford the assured on ship no ground for abandonment.² So, where a British ship was detained eleven days by a British man-of-war, to prevent her proceeding to a port where an embargo was laid on all British vessels, it was held that the assured on ship could not abandon on this ground.³

In France the assured is allowed to give notice of abandonment immediately after capture; but, in case of detention by arrest or embargo, he is obliged to wait before doing so for different periods fixed by the 387th Article of the "Code de Commerce."⁴ "Other laws," says Mr. Benecke, "make no distinction between capture and detention. Those of Prussia admit the abandonment when the liberation is uncertain or tedious. In Genoa and Leghorn the assured may abandon when ship has been detained for three days. In Hamburg the assured cannot claim a

Unless of short duration.

Foreign law.

¹ *Rotch v. Edie*, 6 T. R. 413.

ii. p. 219.

² *Roccus*, no. 60, cited by Emerigon, c. xii. s. 30, vol. i. p. 527; and see Boulay-Paty's Commentary, vol.

³ *Forster v. Christie*, 11 East, 205.

⁴ See Code de Comm., art. 387.

total loss, until the ship or goods have been definitely condemned or irretrievably lost.”¹

In this country no precise period is fixed; but immediately on hearing that his ship is detained under an embargo, the assured may give notice of abandonment, subject, of course, as in all other like cases, to have his right to recover for a total loss defeated, by the restoration of the ship before action brought.²

Fowler v.
Eng. and
Scot. Mar.
Ins. Co.

To avoid any such necessity as this, and to avoid the expense of litigation whilst the intelligence is uncertain or the loss transitory, seems to have been the intention of the parties to the policy in the following case. A Prussian ship from Riga to London, whilst war was imminent between Denmark and the German powers, was insured against capture, seizure, or detention, or the consequences thereof,—“to pay a total loss thirty days after receipt of official news of the embargo or capture without waiting for condemnation.” By reason of sea damage she was forced into Elsinore for repairs, and, whilst there, the Danish government laid an embargo on Prussian shipping on the 3rd of February. On the 4th, the news reached London, and was, upon the information of the London firm that received it, entered the same day in the “Lost Book” at Lloyd’s. This was found by the jury to be “receipt of official news.” On the 5th, a notice of abandonment was given by the assured. By this mode of reckoning, the thirty days expired on the 6th of March. On the 13th of March the embargo was raised, and the ship restored, no action at that time having been commenced. The question was, whether the bringing of an

¹ Benecke, Pr. of Indem. 849.

By the German Code periods of six, nine, and twelve months are fixed, after which abandonment may be made; art. 865, 868; but notice of abandonment must be given before the expiration of the respective periods. Similarly, the Italian Code

(*di commercio*) fixes periods of six and twelve months, and two years, after which abandonment may be made; but notice of abandonment must be given within three days from the day of receipt of the intelligence; art. 485, 486.

² See 6 T. R. 425.

action was necessary to the right of the assured to recover for a total loss under this policy. It was held that the words "without waiting for condemnation," as they merely expressed the rule of law, added nothing to the other words of the condition, and that these other words bound on the one hand the insurer absolutely to pay on the expiration of the thirty days if the ship were not then restored, and on the other the assured to wait that time for the restoration of the ship as the sole condition of the insurer's absolute liability to pay a total loss.¹

In some of these cases of capture, seizure, and arrest, a question has been raised as to the effect of a repurchase of the ship by the master, upon the right of the assured to recover as for a total loss. If the property in the ship has been divested out of the owners by lawful condemnation, and the ship, after being repurchased by the master, acting *bonâ fide* and justifiably for their benefit, is brought back to this country under such circumstances that the owners may, if they please, take possession of her on payment of the amount of repurchase money and of any sums expended abroad in repairing her, they cannot, by refusing to do so, entitle themselves to recover as for a total loss; not, at all events, in cases where they have given no notice of abandonment, nor even, as it should seem, where they have. It is *a fortiori* so, if the property has never been divested by legal condemnation, so that the master could not have resisted the right of the owners to take possession without paying the price of the repurchase.

Effect of repurchase of ship by the master.

Thus, where a ship, after condemnation by a French consul in a neutral port (which, being illegal, effected no change in the property), was lawfully repurchased by the master on account of the owners, and, after being repaired abroad, brought back by him to this country before the commencement of the action; Lord Kenyon held, that the plaintiff, who refused to take possession of the ship or to pay the

M. Masters v. Shoolbred.

¹ *Fowler v. Eng. and Soot. Mar. L. J. (C. P.) 253.*
Ins. Co., 18 C. B. N. S. 919; 34

repurchase money and the cost of the repairs abroad, could not thereby entitle himself to recover a total loss, at all events, as he had given no notice of abandonment; his only right being to recover an average loss, to the amount of the sums spent in the repairs and repurchase.¹

Wilson v.
Forster.

The same decision was given in a case where the master, acting for the benefit of his owners, had repurchased, and repaired on bottomry, a ship seized in Pillau (her port of discharge) by the Prussian government, under the Berlin decree, and there put up to sale at public auction. The master in this case, after repairing, had navigated the ship safely home, where the owners might have had her on paying the amount of the bottomry bond, but they, declining to interfere, allowed her to be sold to satisfy the bond, and then, without having given notice of abandonment, claimed a total loss; the Court, however, said, that, as the seizure was unlawful, and the master had repurchased the vessel of those who had no right to condemn her, the assured were never divested of the property, and were entitled to take possession of her without paying the repurchase money, and that the expense of repurchase and repairs was the most they were entitled to recover from the underwriters.²

In the United
States.

Several cases have been decided in the United States as to the effect of such repurchase on the rights of the parties, where notice of abandonment has been given before the sale in fact took place; the result of these authorities appears to be, that the master in repurchasing is to be regarded as the agent of the owners, before notice of abandonment, and, after it, as the agent of the underwriters.³

Cases of in-
navigability:
where repair
is imprac-
ticable.

We have considered the cases of absolute total loss, such as where the ship is a complete wreck, and her hull dismembered; and again where, although the ship's timbers hold together, and retain the shape of her hull, she is yet

¹ *M'asters v. Shoolbred*, 1 Esp. 238.

¹ *Marsh. Rep.* 425.

³ See *Phillips, Ins.*, no. 1580, 1591.

² *Wilson v. Forster*, 6 Taunt. 25;

shattered and reduced to a mere mass of materials, or "congeries of planks," requiring reconstruction rather than repair, to make her a sea-going ship.¹

We have seen that "if a ship is so injured that it cannot sail without repairs, and cannot be taken to a port at which the necessary repairs can be executed, there is an actual total loss, for that has ceased to be a ship which never can be used for the purposes of a ship."²

We come now to see that if the ship can be taken to a port and repaired, though at an expense far exceeding its value, it has not ceased to be a ship, and that consequently there is only a constructive total loss, which is not recoverable by the assured except upon his giving notice of abandonment.

A ship, insured for six months, and bound from Cork to Quebec, was, on arrival at the latter place, removed into the basin for the winter, but before the expiration of the six months was driven thence by the force of the drift ice, and run upon the rocks. This was in November, and the condition of the ship could not be ascertained till the next spring, when, on survey, she was found to be bulged and much injured, but not irreparably so. In consequence of the difficulty of obtaining materials for the repairs, the master sold her where she lay. The Court, on these facts, unanimously held that the assured could not recover as for a total loss.³

Furneaux v. Bradley.

A West Indian ship, insured from London to St. Thomas, had struck upon some sunken rocks just off the harbour of the latter place, but was got off and brought into port there, so much damaged, however, that she could not be safely sent on another voyage without being hove down and repaired. The means for making these repairs existed at St. Thomas, but owing to the negligence of the agents of the assured there resident, and the misconduct of the local authorities,

Tanner v. Bennett.

¹ Ante, p. 995.

³ *Furneaux v. Bradley*, 1 Park,

² Per Willes, J., in *Barker v. Jan-son*, L. R. 3 C. P. 303, 305. Ins. 365.

who twice condemned the ship after two imperfect surveys, these repairs were not done, and the master, who tried to sell her as a ship, being unable to find any bidders, and being ordered to tow her out of the harbour, ultimately broke her up, and sold her for firewood. Lord Tenterden, on this evidence, told the jury that if the ship might have been repaired but for the negligence of the agents of the assured, the plaintiff could not recover as for a total loss; and the jury accordingly found for an average loss, and, in the absence of evidence to what amount, under his lordship's direction, with nominal damages only.¹

When an owner may abandon rather than repair.

We turn now to consider what it is that will justify an owner in abandoning his vessel when he elects not to repair her.

On that question the rule of law is clearly established but variously expressed. By Blackburn, J., it is said, "the question between the assured and the underwriters on ship is whether the damage sustained may be so far repaired as to keep it a ship, though not perhaps so good a ship as it was before, without expending on it more than it would be worth."² By Tindal, C. J., it is said to be "where the damage to the ship is so great from the perils insured against, as that the owner cannot put her in a state of repair necessary for pursuing the voyage insured, except at an expense greater than the value of the ship, he is not bound to incur that expense, but is at liberty to abandon, and treat the loss as a total loss."³ The same thing, more briefly expressed by Patteson, J., is thus:—"Would a prudent owner uninsured repair?"⁴ "Or rather," said Wilde, B., "would he sell unrepaired?"⁵

¹ *Tanner v. Bennett*, Ry. & Mood. 182. So, *Doyle v. Dallas*, 1 M. & Rob. 48; *Gardner v. Salvador*, 1 M. & Rob. 116; *Domett v. Young*, 1 C. & M. 465; *Hall v. Jupe*, 49 L. J. (C. P.) 721.

² As one of the judges assisting the

House of Lords in *Rankin v. Potter*, L. R. 6 Ho. of Lords (E. & I.) 117.

³ Per Tindal, C. J., in 6 M. & Gr. 810.

⁴ Per Patteson, J., *Irving v. Manning*, 1 H. of Lds. C. 817.

⁵ Per Wilde, B., *Grainger v. Martin*, 4 B. & S. 2.

There are two questions upon the true construction of this rule, which must at once receive our attention. These are, 1. How is the cost of repair to be estimated? 2. What is that value of the ship with which such cost is to be compared for the purpose of ascertaining whether the loss is constructively total?

First, as to the mode of estimating the cost of repairs, various questions have arisen both in this country and the United States. *First. What is the mode of estimating the cost of repairs.*

It may be taken as a settled rule in this country, that the cost of repairs is to be calculated with reference to all the circumstances attending the ship, at the place and time of the casualty. Thus, in case of a ship being sold at a port where great difficulty existed in obtaining materials, and at a season of the year peculiarly unfavourable for repairs, Lord Tenterden told the jury to take both these circumstances into their estimation, in considering whether the probable cost of repairs was such as to justify the sale.¹ So where a Dutch vessel, stranded on the Goodwins and brought into the port of London, would not sell in England for so much as it would cost to repair her here, owing to our then registry laws,—nor in Holland, for so much as it would cost to repair her there, owing to a usage there not to employ stranded ships again,—it was held that the jury were rightly directed to take all these facts into their consideration.²

If a ship be partially repaired at the place of the casualty, and afterwards arrive at her port of destination in a state of complete disability, so that the aggregate of the cost of the partial repairs abroad, and of the repairs necessary to make her a navigable ship again at home, would exceed the price for which she would sell at home after the repairs—this would seem to be a case of constructive total loss.³ *Partial repairs on the spot.*

¹ *Thompson v. Colvin*, L.L. & Wels. Moore, 127; *Somes v. Sugrue*, 4 C. 140. See also *Read v. Bonham*, 3 Br. & B. 147; *Morris v. Robinson*, 3 B. & Cr. 196; 5 D. & Ryl. 35; 593; 2 *Scott's N. R.* 752.

² *Young v. Turing*, 2 M. & Gr. 593; 2 *Scott's N. R.* 752.
³ So held in the United States, *Cannan v. Meaburn*, 1 Bing. 243; 8

The expense
of extricating
the ship.

Whenever, in order to render the ship navigable, it would be necessary, not only to repair her, but also, as a preparatory step, to incur expense for the purpose of getting her off rocks, or weighing her up, it seems clear that the estimated expense of so doing ought to be added to the estimated cost of the subsequent repairs, in order to ascertain whether the sale was a justifiable measure, and the loss constructively total.¹

One third
new for old
not to be
deducted.

In a word, the whole estimated expense of so treating the ship as to make her fit to navigate the seas again, is to be included in the estimate. But a question has been raised in the United States, whether, in thus estimating the probable cost of repairs, a deduction is to be made of one third new for old. The better opinion, which has the sanction of Story, J.,² and is adopted by the Supreme Court of the United States,³ seems to be that this deduction is not to be made. Mr. Phillips lends the weight of his sanction to the same doctrine.⁴ On principle, this opinion appears to be correct; indeed, it follows as a consequence from the test of constructive total loss laid down in our own jurisprudence,—whether a prudent owner, *if uninsured*, would sell rather than repair, from a calculation that the cost of repairs would exceed the repaired value.

What repairs
in case of
decayed ship.

Another question raised both in the United States and in this country has been whether, in the case of an old and decayed ship, the jury, in comparing the probable cost of repairs with the repaired value, are to be directed to exclude from their estimate the cost of all such repairs as the decayed state of the ship may have rendered necessary.

where the aggregate cost of both repairs exceeds half the value. See cases, 2 Phillips, Ins., nos. 1532, 1541, 1548.

¹ See especially *Mount v. Harrison*, 4 Bing. 388; *Doyle v. Dallas*, 1 Mood. & Rob. 48; *Gardner v. Salvador*, *ibid.* 116; *S. L.* in the United States; *Bradlie v. Maryland Ins. Co.*, 12 Peter's Sup. C. R. 400.

² In *Peele v. Merchants' Ins. Co.*, 3 Mason, 27; and see 2 Phillips, Ins., no. 1543.

³ In *Bradlie v. Maryland Ins. Co.*, 12 Peter's Sup. C. R. 399; see 2 Phillips, Ins., *quà supra*.

⁴ 2 Phillips, Ins., no. 1543 (in the 2nd ed. he had opposed the rule; vol. ii. p. 278).

The better opinion in the United States, and the law as settled in this country, would seem to be, that, if the necessity for the repairs may fairly be referred to the perils insured against, and the ship is shown or admitted to have been seaworthy when she sailed, the jury need not be told to exclude the expense of such repairs from their estimate, since but for the casualty by which the loss occurred, the decayed parts of the ship might have been strong enough for the voyage.

This point in our jurisprudence seems to have been first raised, but not disposed of, in the case of *Thompson v. Colvin*;¹ it arose again in the following case. A ship, admitted in the policy to be seaworthy, while homeward bound from China to London was so much damaged by a violent hurricane, that she was obliged to put into the Mauritius; and there it appeared that, from the damage caused by the storm, and the old and decayed state of the ship, she was not worth repairing. But for the storm, however, the decayed state of the ship would not have prevented her performing the voyage in safety. The assured, who had given due notice of abandonment, claimed to recover as for a total loss. Erle, J., left to the jury the question, "whether the cost of repairing the damage arising from the perils insured against would have been greater than the value of the ship when repaired,"—directing them, if they thought so, to find for the plaintiff.

*Phillips v.
Nairne.*

The jury having found for the plaintiff as for a total loss, a new trial was moved for on the ground that they should have been told that, in estimating the cost of repairs, they ought to exclude from their consideration all such repairs as were made necessary by the decayed state of some parts of the ship. The Court, however, after argument, refused the rule, on the ground that the jury had been told to consider the damage done by the perils insured against as the matter on which their estimate should be founded: they added,

¹ Ll. & Wels. 140.

moreover, that, on a careful examination of the evidence, they thought no repairs were included in the estimate, except such as were fairly referable to perils of the seas.¹

In the United States.

The doctrine in the United States on this subject appears to agree with our own, and may be shortly stated to be, that if the ship be seaworthy for the voyage when she sailed, and repairs have been rendered necessary in the course of the voyage by the perils insured against, the increased expense of making such repairs, arising from the old or decayed state of the ship, is not to be deducted in calculating whether the cost of repairing will exceed the ship's value when repaired (or, as the rule is in the United States, half the repaired value).

Thus, in one American case, *Livingston, J.*, remarked, "I adopt, as a general rule, that, if the old injuries (arising, in the particular case, from the ship's bottom being worm-eaten when she sailed) are not such as to make the ship innavigable (unseaworthy), no deduction is to be made, on that account, from the cost of repair;"² and in another case, the Court said, that the objection could be made only in reference to the seaworthiness of the ship at the commencement of the voyage;³ in a third case, the rule is stated to be, "that in case an injury is received by an old and decayed vessel which, independent of the accident, might have run some time, if the repairs cannot be put on her so that the unsound part can be used as formerly, without an expense equal to one half her value, or, in other words, where the injury which the underwriters are obliged to make good is the cause of the decayed parts requiring repairs, that then the assured may abandon: but if repairing the injury, which has arisen from one of the perils insured against, will replace her in the

¹ *Phillips v. Nairne*, 4 C. B. 343; 16 L. J. (C. B.) 194.

It would seem that the question put is the only question that can be put in such a case; the effect of it is to leave the result in the hands of the jury, or of the person who for

the time being is to perform a similar function.

² In *Depeyster v. Columb. Ins. Co.*, 2 Caines, 85; 2 *Phillips, Ins.*, no. 1547.

³ *Depeyster v. Ocean Ins. Co.*, 5 Cowen, 63.

same situation she was in before, no matter how unsound all her other parts may be, then the assured shall not have this right [of the decayed parts being repaired], for all that they can ask is, that the ship may be placed *in statu quo*.”¹

The rule, therefore, on the whole, appears to be this: If the ship was seaworthy when she sailed, the assured may abandon and recover for a total loss whenever, by the perils insured against, the ship is so damaged that she cannot be rendered navigable again, except at a cost greater than her repaired value; and, in estimating such cost, no deduction is to be made for the increased expense of repairs arising from her age or state of decay. If, however, she can be repaired, so as to keep the sea, at a less cost than her repaired value, the assured cannot elect to abandon merely because, owing to her decayed condition, the expense of complete repairs would be greater than this.

General result.

In case the ship is stranded or sunk with cargo on board, and the operations to recover her are applicable equally to the cargo, so that the expense becomes general average, that proportion of it which falls to the account of cargo and of freight is to be deducted from the whole, and the residue only to be considered in estimating the cost of recovery and repairs as to ship.²

In the United States it seems to be laid down that contributions in general average due to the ship, if not paid, may be omitted from the estimates, as they will go to the underwriter on abandonment; but if paid, must be deducted, and therefore contributions due from the same person as owner of freight and cargo to himself as owner of ship must be deducted.³

Is general average to be taken into account?

The second question relates to the “value of the ship,” with which the cost of repairs is to be compared. In open

¹ Per Porter, J., in *Hyde v. Louisiana State Ins. Co.*, 1 Martin, N. S. 410; 2 Phillips, Ins., no. 1547.

² *Kemp v. Halliday*, 34 L. J. (Q. B.) 233; in error, L. R. 1 Q. B. 520.

³ 2 Phillips on Ins., no. 1545.

Secondly.
What is the
value of the
ship with
which the cost
of repairs is to
be compared?

policies it was never doubted that by these words was meant "the worth of the ship to the owner when repaired." It was, however, for some time a question agitated in English law, and only set at rest by the highest tribunal in this country, whether the standard of comparison was the same in valued policies. It is now conclusively decided that it is.

After being successively litigated in *Allen v. Sugrue*,¹ and in *Young v. Turing*,² the question was finally raised before the House of Lords in *Irving v. Manning*.³

Irving v.
Manning.

In that case, an East Indiaman, lying in the course of her voyage in Madras Roads, was carried out to sea in ballast by a violent hurricane, and afterwards brought into Calcutta so damaged that the cost of repairs would have been 10,500*l.*, and her marketable value, when repaired, only 9000*l.*, either in England or Calcutta; the latter sum was also her marketable value at the time of effecting the policy, and immediately before the casualty; she was, however, valued in the policy at 17,500*l.* The ship was neither repaired nor sold, but still lay at Calcutta *in statu quo* at the time of action brought. The owner gave notice of abandonment, and claimed as for a total loss; and the jury found a verdict for the full amount of the insurance, subject to a special case, in which the question for the Court was, whether, under the circumstances, the defendants were liable as for a total loss.

In the course of arguing the special case, it was suggested by counsel for the defendants, that though the marketable value of the ship, when repaired, was only as stated, 9000*l.*, yet her worth to her owners was more, and, in fact, greater than the estimated cost of the repairs, and that, therefore, the Court could not infer that they, as prudent men, if uninsured, would not have repaired. In answer to this argument, Cresswell, J., said, that the question was not whether the plaintiffs, if uninsured, would have repaired, but whether a prudent owner would have done so abstractedly

¹ *Allen v. Sugrue*, 8 B. & Cr. 561; 593; 2 Scott, N. R. 752.
3 M. & Ryl. 9.

³ *Irving v. Manning*, 1 H. of Lds.

² *Young v. Turing*, 2 M. & Gr. Cas. 817; 2 C. B. 784; 1 C. B. 168.

from any particular fancy ; and the Court being of opinion that the facts clearly showed that a prudent owner, if uninsured, would in this case not have repaired, gave judgment for the plaintiffs.¹

The special case was then turned into a special verdict, with the additional finding, "that a prudent owner, if uninsured, would not have repaired the vessel;" and in this state the Court of Exchequer Chamber, on the authority of *Allen v. Sugrue* and *Young v. Turing*,² affirmed the judgment of the Court below. It was finally carried into the House of Lords, and there argued on the part of the underwriters, mainly on the ground that, if the owners under the circumstances were allowed to recover under the policy the full amount of 17,500*l.*, the first principle of Insurance Law—that the policy is a contract of indemnity only—would be overturned.

The opinion of the judges on the point, having been requested by their lordships, was delivered by Patteson, J. After stating that, had this been the case of an open policy, the assured would under the circumstances have been entitled to recover as for a total loss—the amount to be ascertained by evidence—his lordship asks,—“What difference, then, is there from the circumstance that the policy is a valued policy? By the terms of it, ‘the ship, &c., for as much as concerns the assured, by agreement between the assured and assurers, are and shall be rated and valued at 17,500*l.*,’ and the question turns upon the meaning of these words. Do they, as contended for by the plaintiff in error (the underwriters), amount to an agreement that for all purposes connected with the voyage, at least for the purpose of ascertaining whether there is a total loss or not, the ship should be taken to be of that value, so that when a question arises whether it would be worth while to repair, it must be assumed that the vessel would be worth that sum when repaired; or do they mean only that, for the purpose of

Opinion of the
Judges delivered by
Patteson, J.

¹ *Manning v. Irving*, 1 C. B. 168.

² *Irving v. Manning*, 2 C. B. 784.

ascertaining the amount of compensation to be paid to the assured, when the loss has happened, the value shall be taken to be the sum fixed, in order to prevent disputes as to the quantum of the assured's interest? We are all of opinion that the latter is the true meaning; and this is consistent with the language of the policy, and with every case that has been decided upon valued policies."

His lordship, after taking a view of the cases cited in argument, especially *Allen v. Sugrue*, and *Young v. Turing*, thus continued:—"The principle laid down in these latter cases is this: that the question of loss, whether total or partial, is to be determined just as if there were no policy at all, and the established mode of putting the question, when there has been what is, perhaps improperly, called a constructive total loss of a ship, is to consider the policy as altogether out of the question, and to inquire what a prudent uninsured owner would have done in the state in which the vessel was placed by the perils insured against: if he would not have repaired the vessel, it is deemed to be lost. When this test has been applied, and the nature of the loss has been thus determined, the quantum of compensation is then to be fixed.

"In an open policy the amount of compensation must be then ascertained by evidence; in a valued one the agreed total value is conclusive: each party has conclusively admitted that this fixed sum shall be that which the assured is entitled to recover in case of a total loss. It is argued that this course of proceeding infringes on the generally received rule that an insurance is a mere contract of indemnity, for that thus the assured may obtain more than a compensation for his loss; and it is so. A policy of insurance is not a perfect contract of indemnity: it must be taken with this qualification—that the parties may agree beforehand, in estimating the value of the subject insured, by way of liquidated damages, as, indeed, they may in other contracts to indemnify."

The House of Lords affirmed the judgment of the Courts below, with costs.¹

The principle thus fixed by the highest authority in this country had some time previously been established by the Supreme Court of the United States, the only difference being that in America the loss is held constructively total when the cost of repairs exceed half the repaired value. The rule, as laid down by Story, J., in delivering the judgment of the Supreme Court, is, "that if, after the damage is or might be repaired, the ship is not or would not be worth, at the place of repairs, double the cost of repairs" (with us it would be "the cost of repairs"), "it is to be treated as a technical total loss."²

In the United States.

In consequence of the establishment of this doctrine in the United States, it has become usual in the Boston policies to insert a special clause "that the assured should not have a right to abandon the vessel for the amount of damage merely, unless the amount which the insurers would be liable to pay under an adjustment as of a partial loss should exceed half the amount insured."³

Special clause in Boston policies.

In the case of an ordinary ship, suitable for trade in general, her selling price, or market value, seems to be a reasonable standard to use in making comparative estimates on this question of a constructive total loss. But in the case of a peculiar and exceptional vessel, specially built for her owners with a view to a particular trade, it is obvious that her value to sell in the general market would be a very

In case of a peculiar ship.

¹ *Irving v. Manning*, 1 H. of Lds. Cas. 817.

² *Bradlie v. Maryland Ins. Co.*, 12 Peter's Sup. C. R. 398; *Pataasco Ins. Co. v. Southgate*, 5 Peter's Sup. C. R. 604, cited 2 Phillips, Ins., no. 1539. The point has been decided the other way by the Supreme Court of Massachusetts, 2 Phillips, *ibid.*

³ Phillips, *quà supra*.

It seems to have been the inten-

tion of a Welsh mutual insurance club to limit the liability of the club to the amount necessary to repair the vessel and to exclude the right to abandon. It was held, however, that they had not succeeded in expressing their intention by their rules or their policy: *Forwood v. North Wales M. Ins. Co.*, 9 Q. B. D. 732.

erroneous test. Wood, V.-C., dealing with this question, *alio intuitu*, says: "The sum which the ship would have sold for cannot in all cases be the true criterion of its value. Cases might arise in which to adopt that criterion would lead to undue depreciation. A particular class of ships might be adapted for one particular description of traffic and for that alone; and that description of traffic might be entirely occupied by one company, with which it might be hopeless to compete, so that there would be no market for a ship of that particular description. If such a case should ever occur, it would be necessary for the Court to adopt some other criterion. One, I venture to suggest, might be to ascertain the price given for the ship and the subsequent deterioration. Some such criterion would have to be adopted, for otherwise the value of the ship would be what the ship would sell for to be broken up."¹

Grainger v.
Martin.

Such a case as the learned Vice-Chancellor supposed has arisen under a claim against underwriters as for a total loss. The owners had purchased *The Acadia*, a vessel of exceptional size and class, for 20,000*l.*, and were employing her at the time when she was obliged by sea perils to take refuge at the Mauritius, so damaged that the necessary repairs were estimated at 10,500*l.* She would have sold in the general market, when thus repaired, for 7500*l.*; her value to sell when the risk attached was 7500*l.*, but in the policy was fixed at 17,000*l.*; the arbitrator, however, found that 20 per cent. would have been a fair deduction from the cost price for wear and tear at the date of the policy. She was sold at the Mauritius unrepaired, and realized 1350*l.* gross. The arbitrator further found as a fact that "an owner wanting such a ship for the particular purposes of his trade at the time when *The Acadia* was sold, and having to elect to sell, to repair, or to purchase, would have elected to repair,—for such a ship could neither have been built nor purchased at that time for

¹ Per Wood, V.-C., in the *African* limited responsibility sections of the *Steam Ship Company v. Swanzy*, 2 *Merchant Shipping Act*, 1854. K. & J. 664, a case arising under the

so small a sum as 10,500*l*." The Court below, being empowered to draw inferences of fact, inferred that the actual owners, as they were employing the ship at the time, were such owners as the arbitrator here supposed would have preferred repairing, and therefore held that the plaintiffs had failed to prove a constructive total loss.¹ This judgment was affirmed by the Court of Error.²

When, instead of being either sold or abandoned as irreparable, the ship is repaired by the master abroad (acting as agent for the assured) on bottomry, and is brought to her port of destination, charged with the amount of the bottomry bond, the assured, who has given notice of abandonment, cannot recover as for a total loss because this amount exceeds the value of the ship on arrival, which is accordingly sold in order to satisfy it.³ The law appears to be the same in the United States.⁴

When repaired on bottomry by the master.

If, indeed, the underwriters, in case of the apparent disability of the ship, have dissuaded the assured from persisting in his intention to abandon, and themselves ordered the repairs, they will be liable as for a total loss, if, on the ship's subsequent arrival in port, charged with a bottomry lien for the repairs, they refuse to discharge the bond, and allow her to be sold to satisfy the claim of the bondholders.⁵ But it has been held by the highest authority in the United States (against some previous decisions of the State Courts), that if a right to give notice of abandonment has once vested in the assured, owing to the ship being apparently irreparable, except at a cost exceeding half her repaired value (or, as our law is, her full repaired value), the underwriters cannot, by

¹ *Grainger v. Martin*, 31 L. J. (Q. B.) 186.

² In error, 4 B. & S. 9.

³ *Benson v. Chapman*, 6 M. & Gr. 792; *Chapman v. Benson* (in error), 5 C. B. 330; *S. C.*, 2 H. L. Cas. 696. See *Rosetto v. Gurney*, 11 C. B. 176.

⁴ Per Story, J., giving the judgment of the Supreme Court of the United States in *Bradlie v. Maryland Ins. Co.*, 12 Peter's Sup. C. R. 406, 406; see 2 Phillips Ins., no. 1554, 1558.

⁵ *Da Costa v. Newnham*, 2 T. R. 407.

offering to take upon themselves the whole expense of the repairs, defeat the right of the assured to insist on his notice of abandonment and recover as for a total loss.¹

Bottomry.

It should be added, that the doctrine of constructive total loss is not applicable to contracts of bottomry,² nor to policies effected on bottomry loans. If the ship exist in species, though in a state which would warrant an assured on ship in abandoning, as where the cost of repairs would greatly exceed her value when repaired, the assured on bottomry cannot recover; for the ship must be absolutely and totally destroyed in order to discharge the borrower:³ *à fortiori* capture, when it produces merely a temporary retardation of the voyage, and is followed by restoration before action brought, will not discharge him.⁴

Constructive total loss of Goods, in cases of capture.

Capture, arrest or embargo if likely to be of long continuance, barratrous seizure, or total desertion at sea by the crew, —any forcible dispossession or effective privation of control over his property, gives a *prima facie* right of abandonment to the assured on goods, just as in the case of the ship.

Capture, followed by confiscation, or by unpreventable sale, without restitution before action tried, is, as we have already seen, a case of total loss on goods, without notice of abandonment.⁵ If, however, after capture, or even after capture and confiscation, the goods subsist in species, and there is any chance of restitution of them as the issue of any pending negotiation, the assured cannot recover as for a total loss without notice of abandonment.⁶ Restoration at

¹ Per Story, J., *Peele v. Merchants Ins. Co.*, 3 Mason, 27. See 2 Phillips Ins., no. 1557.

² *Stephens v. Broomfield*, L. R. 2 P. C. 516.

³ *Thompson v. Royal Exch. Ass. Co.*, 1 M. & Sel. 30; *Broomfield v. Southern Ins. Co.*, L. R. 5 Ex. 192.

⁴ *Joyce v. Williamson*, 2 Marsh. Ins. 760.

⁵ *Mullett v. Shedden*, 13 East, 304; *Mellish v. Andrews*, 15 East, 13; *Stringer v. English, &c.*, Ins. Co., L. R. 4 Q. B. 599; in error, 5 Q. B. 676.

⁶ *Tunno v. Edwards*, 12 East, 488.

any time before trial, in the absence of any notice of abandonment, reduces the loss to a partial loss;¹ and so it does even after notice of abandonment, if the restoration be before action brought.²

If, after capture and before notice of abandonment, a final decree of restitution has been made, it is held in the United States, and no doubt would be in this country,³ that the assured on goods cannot, on hearing at one and the same time of the capture and decree of restitution, give notice of abandonment, although the goods may not in fact have been at that time actually restored to him; for there is then, no such prospect that the loss, as to him, will be eventually total, as to justify a notice of abandonment;⁴ and the case is the same where notice of abandonment has been given after the final decree of restitution was in fact made, but before the assured had heard of it.⁵

News at once
of capture
and of resti-
tution.

But, although a *prima facie* right of abandonment may have been duly exercised by giving notice of abandonment when the circumstances justified it, still the right of the assured to recover as for a total loss depends, in this country, upon the state of the property at the time of action brought. If before that time the goods, after capture and recapture, have been restored to the assured, or brought into this country under such circumstances that he may, if he pleases, take possession of them and may reasonably be expected to do so, his right to recover as for a total loss will be thereby divested. Thus, where after seizure for breach of blockade and subsequent rescue the goods were brought back to their home port of loading in this country and there warehoused,

Condition of
loss at the
time of action.

Naylor v.
Taylor.

¹ Goldsmid v. Gillies, 4 Taunt. 802.

² Hamilton v. Mendes, 2 Burr. 1210. *See* also after notice and after action brought, Rodocanachi v. Elliott, L. R. 8 C. P. 649.

³ See Barker v. Blakes, 9 East, 283.

⁴ Adams v. Delaware Ins. Co., 3 Binn. 287, cited 2 Phillips, no. 1662.

⁵ Marshall v. Delaware Ins. Co., 4 Cranch, 202; Phillips, *supra*.

so that the assured might have had possession of them on paying the salvage expenses, but, instead of doing so, he left them untouched, and brought his action for a total loss, relying on a previous notice of abandonment,—it was held that he could not recover, as the loss had, in fact, ceased to be total before action brought.¹

The mere fact of restoration or subsistence in species will not divest the right.

Yet the mere fact that the goods are restored, or subsist in species, before action brought, is not of itself sufficient, irrespective of all considerations as to the circumstances under which the restoration takes place, to deprive the assured, who has once justifiably given notice of abandonment, of his right to insist on such abandonment and recover as for a total loss.

Dixon v. Reid.

A ship, timber laden, insured from Sierra Leone to this country, was barratrously seized by her crew and carried off to Barbadoes, where the ship and part of the cargo were sold (but not for or on account of the assured), to defray the expenses incurred there; the remainder of the timber (186 logs out of 233), was afterwards forwarded to this country by another ship, but not by the directions of the assured or his agent. On its arrival he at first seemed disposed, but ultimately refused, to take to it, and it was sold in this country, but not by him or his orders: after this, he brought his action for a total loss, relying on the notice of abandonment given on his first hearing of the casualty; the Court held this to be a clear case of constructive total loss.²

Parry v. Aberdeen.

So, where, after desertion of the ship by the crew, and notice of abandonment duly given, the goods were, many months after the loss, delivered to the agents of the assured abroad, before action brought, but in such a state of damage, that they would have been worthless if sent on to their port of destination, even had there been a ship to take them on; and they were, consequently, sold at the foreign port for less than the salvage expenses—this was held not to be such a restoration of the goods as to prevent the assured from

¹ Naylor v. Taylor, 9 B. & Cr. 718; 4 M. & Ryl. 526.

² Dixon v. Reid, 5 B. & Ald. 597; 1 Dow & Ryl. 207.

insisting on his abandonment, and recovering as for a total loss.¹

Still less doubt will there be, if,—after capture, seizure, or arrest, followed by recapture, decree of restitution, &c., the goods never have been effectively restored to the possession, or within the means of possession, of the assured before action brought,—the loss once total, continues total as to the assured, down to the time of action brought.

A fortiori if there be no restitution.

“If, before action brought,” said Lord Campbell,² “the goods had been restored to the assured, or he had the means of getting possession of them, under such circumstances as ought to have induced a prudent man to take possession of them, his claim could now only have been made for a partial loss. It has often been held, that if the ultimate consequence of a peril insured against is merely the loss of a voyage or a suspension or retardation of a mercantile adventure, although a notice of abandonment had been justifiably given, a total loss cannot be claimed. But the mere existence of the ship or goods insured, after a total loss and abandonment, so that possession of them may possibly be resumed by the owner, will not reduce it to a partial loss: *McIver v. Henderson*³ and *Cologan v. The London Assurance Company*.⁴ The true rule seems to us to be laid down by Bayley, Justice, in *Holdsworth v. Wise*,⁵ that the subject of an insurance must be in ‘existence under such circumstances, that the assured may if they please have possession and may reasonably be expected to take possession of it.’”

A cargo of wheat, insured “free from average” from Quebec to Teneriffe, was, with the ship, captured and recaptured and carried into Bermuda, where part of the wheat was thrown into the sea as putrid. As to the rest, an embargo on all

Cologan v. London Exch. Ass. Co.

¹ *Parry v. Aberdeen*, 9 B. & Cr. 411; 4 M. & Ryl. 343.

3 E. & B. 190.

² *Lozano v. Janson*, 28 L. J. (Q. B.) 337, 343; 2 E. & E. 100.

³ 4 M. & Sel. 576.

⁴ 5 M. & Sel. 447.

⁵ 7 B. & C. 798.

See the judgment in *Dean v. Hornby*,

provisions in Bermuda (owing to a scarcity of food there), prevented the captain forwarding it, and he, consequently, offered it for sale at Bermuda, but owing to the low price bid, he bought it in for his owners, and wrote to England to inform them of what had passed. Subsequently the captain, by leave, carried it to Madeira, sold it there, and took in a cargo of wine, with which he arrived in England, before action brought: the assured, relying on a timely notice of abandonment, brought their action for a total loss, and the Court held, under the circumstances, that they had a right to recover the whole amount claimed.¹

**Barker v.
Blakes.**

An American (neutral) ship, having on board a cargo of oil, insured on behalf of an American citizen from New York to Havre, was seized by a British cruiser, and carried into Bristol on suspicion of carrying enemy's goods. While she was there, the British government declared the port of Havre in a state of blockade, and so it continued from that time till the commencement of the action. Some time after this, restitution of the oil was made under decree to the agents of the assured, who applied to the captain of the ship to reload and carry it on to Harve, which, however, he absolutely refused to do, and sailed away to New York, leaving the oil behind him in Bristol, and there it was sold, without prejudice to the rights of the parties. The assured then brought his action for a total loss, and failed in it, for want of a notice of abandonment in due time.²

**Lozano v.
Janson.**

A vessel was boarded on the coast of Africa as a slaver by a British cruiser, and carried with her cargo, the subject of insurance, to St. Helena, where both ship and cargo were condemned by the Vice-Admiralty Court in the year 1854. The cargo was unloaded, such of it as was perishable sold, and the rest stored on the island subject to an appeal to the Privy Council in England; bail, however, would have been taken, but was not given, to the full amount of the invoice

¹ *Cologan v. London Ass. Co.*, 5 M. & Sel. 447.

² *Baker v. Blakes*, 9 East, 283.

value. The insurance was on cargo at and from London to Ambriz or Loanda on the coast of Africa. The sentence of condemnation was reversed in 1858, and the assured, who had given notice of abandonment in due time, was held by the Court of Queen's Bench, in 1859, entitled to recover as for a total loss.¹

Where the original ship is disabled in the course of the voyage, and no other can be procured at the port of the casualty or any neighbouring port, the master has a right, where the cargo is of a perishable nature and sea damaged, to sell it at such port, for the benefit of all concerned, and the assured on goods, in like case, may abandon and recover as for a total loss.

Constructive
total loss of
Goods in case
of sea da-
mage.

Perishable
goods.

If, indeed, it is reduced by sea damage to such a state, at the intermediate port, that, if sent on to its port of destination, it would perish before arriving there, the master is justified in selling, and the assured may recover a total loss, even without notice of abandonment, although the original ship may not be disabled, but capable of being repaired so as to take on the cargo.²

Where, however, the original ship can be repaired, with any prospect of sending on the cargo, or what remains of it, in a marketable state to its port of destination, or where another ship can be procured, either at the same or a contiguous port, without any very extraordinary delay or sacrifice, the master is, at all events, empowered, if not bound, to send it on; and he certainly has no right, in such case, to sell; nor can the assured on goods abandon and recover as for a total loss.³

If the cargo be imperishable, or, though perishable, not so sea damaged as to be in danger of being spoiled or destroyed by the delay, the mere impossibility of repairing the original

Imperishable
goods.

¹ *Lozano v. Janson*, 2 E. & E. 266; *Saunders v. Baring*, 34 L. T. 100; 28 L. J. (Q. B.) 337. N. S. 419.

² *Roux v. Salvador*, 3 Bing. N. C. ³ *Meyer v. Ralli*, 1 C. P. Div. 358.

ship, or procuring another, in time to send on the cargo, so as to save the season, will not entitle the master to sell, nor the assured, on abandonment, to recover as for a total loss.¹

Criterion.

The test, in respect of goods that have been sea damaged, whether memorandum articles or not, or that have been stranded, is the impossibility of sending them on except at a cost greater than their saleable value on arrival.²

Retardation
or loss of
voyage.

The Court of King's Bench, in the time of Lord Mansfield, proceeding on the doctrine that loss of the voyage was loss of the subject insured, gave certain decisions, which probably would not now be upheld. Thus in one case, where insurance was on "ship, freight, and cargo, from Tortola to London," and the ship, soon after sailing, put back into Tortola, irreparably damaged,—Lord Mansfield allowed the assured to retain their verdict for the whole amount insured, though the greater part of the cargo (sugars warranted free from average) might have been sent on from Tortola to London by other ships then in the harbour. One ground of decision was, that the whole cargo could not be sent on.³ In another case the decision was, that a perishable cargo (also sugars) having been brought by the recaptors into a foreign port during the existence of an embargo there, where for want of storehouses it must necessarily have been kept six months on board a leaky ship, was justifiably sold by the master so as to cast a total loss on the underwriters.⁴

In both these cases Lord Mansfield lays considerable stress upon the loss of the voyage for the season, as one of the criteria for determining whether the sale was justified, and the loss constructively total. The two following cases, however, clearly establish the position, that the mere loss

¹ *Currie v. Bombay Native Ins. Co.*, L. R., 3 P. C. 72.

² *Rosetto v. Gurney*, 11 C. B. 176; *Farnworth v. Hyde*, 1 H. & R. 433; on appeal, L. R., 2 C. P. 204; *Navone v. Haddon*, 9 C. B. 30; *Reimer v. Ringrose*, 6 Exch. 263.

³ *Manning v. Newnham*, 3 Dougl. 130.

⁴ *Milles v. Fletcher*, 1 Dougl. 231*a*. This case may perhaps be justified on the facts, though not on the alleged grounds of the decision.

or retardation of the voyage for the season, owing to the disability of the original ship, and the impossibility of at once procuring another to forward the cargo by it, never gives the right of sale or abandonment in the case of imperishable goods, and only does so in the case of perishable commodities when from the sea damage they have already sustained it appears in the highest degree probable that they will be totally destroyed, or spoiled as merchantable articles, if kept at the port of distress till they can be forwarded. In this latter case the master may sell, and the assured abandon, not because the voyage has been lost or retarded, but because, in the language of Lord Ellenborough, "the goods themselves have received some material damage, operating a destruction of the thing insured."¹

"Copper, iron, and nails," were insured "free from average" from London to Quebec. The ship, which sailed late in the autumn, was compelled by tempestuous weather to put back and run into the port of Kinsale, where she was surveyed and found to be so damaged that she could not be repaired in time to reach Canada that season; nor could any ship be procured, either at Kinsale or Cork, in which to send on the cargo till the next spring. On the result of the survey being known, the assured gave notice of abandonment, and the cargo, which had been only damaged to a very trifling extent, was sold at Kinsale by their orders. The Court held, that under these circumstances the assured could not recover as for a total loss, as this was a mere temporary retardation of the voyage not at all tending to the destruction of the thing insured.²

Anderson v.
Wallis.

The decision of the Court was the same in the following case, where the thing insured, though perishable in its own nature, was not so sea damaged as that it was likely to be spoiled, if kept till it could be forwarded. The insurance was on "flour,"³ warranted free from average, from Waterford to

Hunt v.
Royal Exch.
Ass. Co.

¹ 5 M. & Sel. 57.

² Anderson v. Wallis, 2 M. & Sel. 240.

³ Pork was also included in the policy; but as to it no question was made. "This must be considered as

St. John's, Newfoundland. The ship, sailing in October, had been compelled to put back into Cork so disabled as to be obliged to be broken up and sold. The flour was found very little damaged, and might have been safely kept at Cork till the spring, to be forwarded then to its destination. Instead of this, the assured had it sold, and, after notice of abandonment, claimed as for a total loss; but the Court held it to be only a partial loss.¹ "Here," said Lord Ellenborough, "was a retardation of the adventure only; it is stated that the cargo could not have been forwarded till next spring, that is it might have gone then, for it is not to be supposed that at such a port as Cork there would not be some vessel to be found for the next season, to forward the cargo to St. John's—nor can I necessarily infer that the flour would be changed in quality and condition by the delay, from November to April, so as to incur any material damage operating the destruction of the thing insured."²

Van Omeron
v. Dowick.

On the same principle, where a case of cutlasses was sold by the master at an intermediate port from the impossibility, owing to contrary winds and the necessity of keeping with the convoy, of carrying them on in his own ship to their port of destination, this sale was held not justified;³ and the decision was the same where a cargo of "crates, earthenware, and Indian blues," destined for the African trade, was sold by the master at the Bermudas (whither his ship had been carried after capture and recapture), because he had lost all his boats, which were necessary for the barter trade, and could not get a sufficient complement of hands.⁴

Underwood v.
Robertson.

On the same ground, it was held that underwriters, on goods insured from London to Demerara, were not liable as for a total loss, where the ship, being captured and recaptured,

a policy on flour only (for the pork is out of the question), warranted free from average;" per Lord Ellenborough, 5 M. & Sel. 55.

¹ Hunt v. Royal Exch. Ass. Co., 5

M. & Sel. 47.

² 5 M. & Sel. 55.

³ Van Omeron v. Dowick, 2 Camp. 42.

⁴ Wilson v. Millar, 2 Stark. 1.

was sent into St. Thomas, stript of all her hands, and the captain, not being able on his arrival there to procure a fresh crew, or otherwise to raise money to pay the salvage, for that reason within three days of his arrival sold the ship and cargo, and broke up the adventure;¹ Lord Ellenborough remarked, that he ought to have waited a reasonable time; ships that came in might have spared him assistance, or seamen might possibly have been obtained from the neighbouring island. "It does not satisfactorily appear that he might not have raised the money by drawing on his owners or hypothecating the ship. Even if the ship was prevented from completing the voyage, it does not appear that the goods might not have been forwarded to their place of destination by other vessels."

A cargo of wheat was insured "free from average" from London to Lisbon; the ship was so damaged in the Downs that she was forced to run into Dover, where, on survey, she was found to be wholly disabled from pursuing her voyage, except at a cost greater than her repaired value. Of the whole cargo, consisting of 1160 quarters, 400 quarters only were dry, 700 were kiln-dried, and the residue was found to be wholly spoilt. On this state of facts, Lord Ellenborough said (in reference to the case of *Manning v. Newnham*, which had been cited as in point for the plaintiff), "I accede to that case; and if it shall be proved that the voyage here was not worth pursuing, and that there were no means of pursuing it, I think this must be considered a total loss." When, however, it appeared that at the time of the casualty there was a brig lying in Dover Harbour, in which the wheat might have been sent on to Lisbon, Lord Ellenborough said he was clearly of opinion, on this additional evidence, that the action could not be maintained for a total loss.²

*Wilson v.
Royal Exch.
Ass. Co.*

On the same ground, in a case where the ship was wrecked at her port of loading, but her cargo, consisting of tobacco

*Thompson v.
Royal Exch.
Ass. Co.*

¹ *Underwood v. Robertson*, 4 Camp. 138.

² Camp. 623; *quare* of the language here employed and the case referred to.

³ *Wilson v. Royal Exch. Ass. Co.*,

and sugar insured "free from average" was all got on shore and saved, though in a very damaged state, but it did not appear, though the original ship was disabled and necessarily broken up, that what was saved of the cargo might not have been forwarded in other vessels—Lord Ellenborough and the Court of King's Bench held that the assured, who had abandoned, could not recover as for a total loss.¹

*Navone v.
Haddon.*

The same principle was applied in the following case:—Eighty-one bales of waste silk were insured, valued at 2245*l.*, "free from average, from Leghorn to Liverpool." The ship, being compelled by stress of weather to put into Gibraltar, was there repaired, her cargo being necessarily unloaded. Some of the bales were found to be much damaged by salt water, and were consequently sold at Gibraltar by the master, in the exercise of what the jury found to be a reasonable discretion, and such as a prudent uninsured owner would have exercised, but no one of the bales was so damaged as to make its whole contents useless for any mercantile purpose. All the silk might, at a reasonable and moderate expense, have been put in a condition to be brought home by another vessel, and some of it was, in fact, brought home to England and sold as silk, though in a very deteriorated state: the Court of Common Pleas held that this was not a total loss, and consequently that the underwriters were not liable.²

What expenses to be taken into account.

It is of great importance in relation to this subject to ascertain what charges and expenses may be taken into account in determining whether the goods are worth sending on. In *Reimer v. Ringrose*,³ a cargo of wheat was so greatly damaged that the master, intending the best for all concerned, sold it at an intermediate port in Norway. The Court of Exchequer laid it down that the expense of drying the wheat and of sending it on might be taken into account in considering whether it was worth the outlay.

¹ *Thompson v. Royal Exch. Ass. Co.*, 16 East, 214; and see the comments of Lord Abinger on this case in

Roux v. Salvador, 3 Bing. N. C. 280.

² *Navone v. Haddon*, 9 C. B. 30.

³ *Reimer v. Ringrose*, 6 Exch. 263.

The Court of Common Pleas, however, in a subsequent case, declined to adopt this rule,¹ except with limitations. In that case a cargo of 3700 quarters of wheat, valued at 6400*l.*, was shipped and insured in bulk "free from average" on a voyage from Odessa to Liverpool.² Shortly after sailing the ship "stranded," receiving very considerable sea damage, and was compelled to put into Constantinople to refit. The repairs and expenses amounted to 1800*l.*, to raise which the master hypothecated the ship and cargo for 1850*l.* by a bottomry bond, payable ten days after arrival in the port of delivery. The ship again sailed, and before her arrival was wrecked and carried into Cork by salvors, where the cargo being found to be very considerably damaged, and the vessel not worth repairing, notice of abandonment was given and both were sold.

Rosetto v. Gurney.

The jury found as a fact that 1700 quarters (about half) of the wheat might have been dried, warehoused, and sent on to Liverpool in a marketable condition; and the Court held that the loss on the wheat was an average loss only, if part of the cargo could have been sent on to the port of destination at less than its market value when there; but that in considering that question, the jury were bound to take into account the following items:—1. The cost of unshipping the cargo; 2. Of drying and warehousing it; 3. Of transshipping it; 4. The increased cost of sending it on (if it could not be forwarded on other terms) at a higher than the original rate of freight; 5. The amount of salvage allowed in proportion to the value of the cargo saved. If the aggregate of these items exceeded the selling value of the cargo at the port of

¹ Judgment of Common Pleas in *Rosetto v. Gurney*, 11 C. B. 188.

² There was the usual warranty "free of average;" but as there had been a clear stranding in the course of the voyage, the clause did not apply so as to protect the underwriters from an average loss.

³ If sent on in the original ship, it is on the original contract, and then nothing is to be added as an average loss; so, if transhipped at a less or the same freight; but if transhipped necessarily at a higher rate, the increase is an average loss.

discharge, then the loss would be total upon notice of abandonment.

Expenses of hypothecation cannot be taken into account.

With regard, however, to the debt and costs paid to the holders of the bottomry bond, the Court held, that they could not be taken into consideration in estimating the extent (whether total or partial) of the loss.¹ "The underwriter," as Cresswell, J., expressed it in the course of the argument, "does not insure against a loss by hypothecation."² "It is a risk," says Jervis, C. J., in delivering the judgment of the Court, "not contemplated by the policy, and which the assured must take upon himself."³

Rule in *Rosetto v. Gurney* reconsidered and affirmed.

Some doubt existing as to what is the effect and limit of the rule laid down by the Court in *Rosetto v. Gurney*, especially in respect of freight, that rule was expressly reconsidered, after argument, by the Court of Exchequer Chamber in the case of *Farnworth v. Hyde*,⁴ and in expressing their concurrence with the rule in that case as being the true rule, they said:—"We are all of opinion, that where goods are, in consequence of the perils insured against, lying at a place different from the place of their destination, damaged, but in such a state that they can at some cost be put into a condition to be carried to their destination, the jury are to determine whether it is practically possible to carry them on, that is, according to the well-known exposition in *Moss v. Smith*,⁵ whether to do so will cost more than they are worth; and that in determining this, the jury should take into account all the extra expenses consequent on the perils of the sea, such as drying, landing, warehousing, and reshipping the goods; but that they ought not to take into account the fact, that if they are carried on in the original bottom, or by the original shipowner in a substituted bottom, they will have to pay the freight originally contracted to be paid; that

¹ *Rosetto v. Gurney*, 11 C. B. 176, 182, 190.

² Per Cresswell, J., 11 C. B. 182.

³ Per Jervis, C. J., 11 C. B. 190.

⁴ *Farnworth v. Hyde*, L. R., 2 C. P. 204.

⁵ *Moss v. Smith*, 9 C. B. 94.

being a charge to which the goods are liable, when delivered, whether the perils of the sea affect them or not. We also agree that *Rosetto v. Gurney*¹ correctly decides that where the original bottom is disabled by the perils of the seas, so that the shipowner is not bound to carry the goods on, and he does not choose to do so, the jury are not to take into account the whole of the cost of transit from the place of distress to the place of destination, which must be incurred by the goods owner if he carried them on, but only the excess of that cost above that which would have been incurred if no peril had intervened."

There is now, also, no doubt that, although the whole of the cargo cannot be sent on,² this circumstance is not conclusive in determining whether a sale by the master is justifiable, or the loss on goods constructively total.³

Impracticability of sending on the whole.

It is equally clear, and is established by the same authorities, that if a sale of the cargo be not otherwise justifiable, it will not be rendered so by being made under the decree of a Vice-Admiralty Court or any analogous Court abroad.⁴

The two following authorities seem hardly consistent with the current of the more recent decisions, and would probably not now be supported to their full extent. In neither case was there a warranty to be free from average.

A cargo of sugars was insured from Liverpool to Calais: the ship was forced to put back to Liverpool in a totally disabled state, and the sugars, having been necessarily unloaded, were found, on survey, to be so sea damaged that no part of them was in a merchantable state, and that they could

Garnon v. Royal Exch. Ass. Co.

¹ *Rosetto v. Gurney*, 11 C. B. 176.

² See *Manning v. Newnham*, 3 Doug. 130; *Anderson v. Royal Exch. Ass. Co.*, 7 East, 38.

³ *Freeman v. East India Co.*, 5 B. & Ald. 617; *Morris v. Robinson*, 3 B. & Cr. 196; 5 Dowl. & Ryl. 35; *Cannan v. Meaburn*, 1 Bing. 243; 8

Moore, 127; *Moss v. Smith*, 9 C. B. 94; *Rosetto v. Gurney*, 11 C. B. 176; *Meyer v. Ralli*, 1 C. P. D. 358.

⁴ See also *Reid v. Darby*, 10 East, 143; per Dr. Lushington, *The Eliza Cornish*, 1 Eoc. & Ad. 36; *Meyer v. Ralli*, 1 C. P. D. 358.

not have been sent on except as damaged goods, though ships might easily have been procured to take them on in that state. Under these circumstances the sugars were sold at Liverpool, where they realized within a third of their invoice price; and the assured, who had given due notice of abandonment, claimed to recover as for a total loss. Gibbs, C. J., told the jury, at the trial, that the assured would not be justified in abandoning, unless the property was reduced to such a state that it could not be applied to the original purpose of the voyage; but that they would be entitled to do so "if it was not in a proper condition for the market:" the jury thought the sugars were not in a fit state to be forwarded, and found for a total loss: a verdict which the Court refused to disturb.¹

Hudson v.
Harrison.

A cargo of Cape wines, consisting of 241 pipes and 71 hogsheads (of the invoice value of nearly 8000*l.*), was insured (but without any warranty to be free from average) from the Cape to Bristol, Liverpool or Dublin. Had the ship arrived safely, the assured intended to have landed 100 pipes at Bristol, and to have sent on the remainder to Dublin, which was, therefore, the ultimate port of destination. The ship, however, just before reaching Bristol, was driven by a gale on the rocks at Portishead, about thirteen miles from that city, where she bulged, heaved over, and, finally, lay in such a position that the whole of her cargo was under water at high tide. The assured, immediately on hearing of the casualty, gave notice of abandonment, and measures were then taken with the express sanction of the underwriters to rescue the cargo. The result was, that 229 pipes and 67 hogsheads were got out, of which 71 pipes and 43 hogsheads

¹ *Gernon v. Royal Exch. Ass. Co.* at N. P. Holt, 52; in Banc. 6 Taunt. 383; 2 Marsh. R. 88. On this case being cited in *Navone v. Haddon*, Maule, J., remarked, "That was not the case of an insurance free from average," 9 C. B. 98. This is undoubtedly so. It appears from the

report in *Holt*, that the ship had stranded before putting back to Liverpool; the case, therefore, was treated as though no warranty had existed, though the policy, as in the similar case of *Rosetto v. Gurney*, had no doubt been framed with the usual average clause.

were sound and full, and 17 pipes and 4 hogsheads were quite empty; the residue had either partially leaked, or were more or less damaged by sea water, but were not in an unmerchantable state; and ships might easily have been procured to take them on to Dublin. The wines were finally sold for the gross sum of 4044*l.* 2*s.* 6*d.* (rather more than half the invoice price), realizing the net sum, after deducting salvage and all expenses, of 2570*l.* 16*s.* 3*d.* The plaintiff had a verdict for a total loss, which he retained under the circumstances stated with the sanction of the Court.¹

We come now to consider constructive total loss as an eventual fact in relation to freight, and the right and consequences of abandonment in respect of the assured and insurer on that subject.

Constructive
total loss of
Freight.

We have already seen that an absolute total loss on ship and cargo, or, in some cases, on either, may involve an absolute total loss on freight; in other words, where the circumstances of the case are such as to make the ultimate earning of freight wholly impossible, no notice of abandonment is requisite in order to enable the assured on freight to recover the whole sum he has insured on that interest.² On the other hand, where the circumstances are such as to make the ultimate earning of freight highly doubtful, without, however, destroying all hopes of eventually earning it, then notice of abandonment may be necessary to entitle the assured on freight to recover as for a total loss on that interest.

"*Primâ facie*," says Tindal, C. J., "the assured had a right of abandoning the freight where there has been a constructive total loss of the ship."³ Thus, no doubt, capture, arrest,

¹ *Hudson v. Harrison*, 3 B. & B. 97.

² *Rankin v. Potter*, L. R., 6 Ho. of Lords (E. & I.) 83; *Green v. Royal Exch. Ass. Co.*, 6 Taunt. 66; *Idle v. Royal Exch. Ass. Co.*, 8 Taunt. 755;

3 *Moore*, 115; *Wilson v. Forster*, 6 Taunt. 25; 1 *Marsh.* 425; *Robertson v. Marjoribanks*, 2 Stark. 573; *Mount v. Harrison*, 4 Bing. 388.

³ Per Tindal, C. J., in *Benson v. Chapman*, M. & Gr. 810; not affected

embargo, or any other peril insured against, the effect of which is either to break up the voyage altogether, or to prevent, or for a very long period suspend the earning of freight, vests an immediate right to give notice of abandonment, and afterwards to recover as for a total loss by action commenced before restitution.

Of course if freight have been earned, although it reach not the pocket of the shipowner, there is no loss and there can be no recovery under the policy, and there is nothing to abandon.¹

M'Carthy v.
Abel.

Under a policy on homeward freight from Riga, where the ship was seized under the Russian embargo of the 7th November, 1800, the master and crew taken out, and the cargo, the greater part of which had been loaded, was re-landed, the assured gave immediate notice of abandonment to the underwriters on freight, and also, on the same day, to the underwriters on ship, with whom he had effected a separate insurance. In May, 1801, the embargo was taken off, the master and crew released, the original cargo again put on board, and the ship arrived in this country before action brought, earning full freight. Under these circumstances Lord Ellenborough held, that the plaintiff could not recover a total loss against the underwriters on freight; 1. Because in the event freight had been fully earned, and therefore no loss could be properly demandable from the underwriters on freight, "who merely insure against the loss of that particular subject;" 2. That if freight could be considered as in any other sense lost to the assured, it had become so by their own act in abandoning the ship to the underwriters thereon, with which act, and its consequences, the underwriters on freight had nothing to do.²

as to this point by the judgment of the Court of Error or the House of Lords. See this acknowledged by Lord Truro in *Scottish Marine Ins. Co. v. Turner*, 1 Macq. H. of Lds. C. 334.

¹ See *Thompson v. Rowcroft*, 4

East, 34, and the other cases on the Russian embargo; per Alderson, B., *Benson v. Chapman*, 2 H. of Lds. C. 721; *Scottish Mar. Ins. Co. v. Turner*, 1 Macq. Ho. of Lords, 334.

² *M'Carthy v. Abel*, 5 *East*, 388.

Upon these same grounds, the House of Lords gave judgment for the insurers on freight in a case where the ship was abandoned in the port of destination after freight was earned; the freight became payable to the abandonees of ship, and the owner did not recover on his freight policy.¹

The same holds good of a mere retardation of the adventure, if freight is nevertheless ultimately earned before action brought. Under an insurance generally on freight for the homeward voyage, the ship under charter-party arrived in September at Riga, and was immediately seized and detained by order of the Russian government, without being suffered to load. This detention continued till the frost set in, and thereby the ship was kept at Riga all the winter, and ultimately did not get a cargo from the charterer's agents at all; next spring, however, the master procured a cargo from other persons, with which, before action brought, he returned to England, and earned full freight. The assured claimed a total loss, but the Court held he could not recover.

Everth v. Smith.

The policy being on freight generally, "the underwriter," said Lord Ellenborough, "did not insure that a particular freight should be brought home, but if any freight is brought home, a loss has not happened for which he undertook to indemnify the assured. In this case, the only inconvenience that has arisen is to be attributed to the protraction of the adventure; but that was decided in *Anderson v. Wallis and M'Carthy v. Abel* not to constitute a loss. It is certainly a loss of the particular trade which the assured had personally in contemplation, but it is not within the intention of the policy. The mere retardation of the adventure, and the consequent inconvenience and expense arising from it, are not a substantive cause of loss where the particular thing insured has not received damage; and whether the freight earned be the particular freight contracted for by the assured, or a posterior freight, makes no difference: if freight has been

Policy on freight generally is satisfied if any freight be earned.

¹ *Scottish Mar. Ins. Co. v. Turner*, 1 Macq. H. of Lords Cas. 334.

fully earned there can be no loss properly demandable from the underwriters."¹

In a case, indeed, that came before Sir Vicary Gibbs, the year after this decision, that learned judge intimated, in the course of the argument, that, "when the freight of a ship is insured, it becomes an insurance on that cargo:"² but the year following, Lord Ellenborough decided the case of *Barclay v. Stirling* on the same principle as that laid down in *Everth v. Smith*:³ more recently it has been acted upon by Lord Tenterden,⁴ and may, therefore, be considered to be as firmly established by authority, as it is reasonable in principle.

If freight is in the event actually and fully earned, the mere fact that it is swallowed up at the port of destination by the charges of a bottomry loan raised by the master abroad as agent of the owners for the repair of his ship, does not constitute a constructive total loss as against the underwriters on freight.⁵

If the ship with cargo on board becomes in the course of the voyage totally and finally disabled by reason of the perils insured against, the master may send on the goods by another ship, but he is not bound to do so.⁶ If he send them on in performance of his contract to carry, he thereby earns the original freight, and is entitled to charge the insurers with the expense of it.⁷ In respect of the shipper, the shipowner's performance of that contract after his ship is finally disabled, is an option merely, and not a legal obligation; but in respect of the insurer on freight, it seems the shipowner is in these circumstances under an obligation either himself to

¹ *Everth v. Smith*, 2 M. & Sel. 278, 284, 286. See *S. P.*, in *Barclay v. Stirling*, 5 M. & Sel. 6.

² In *Green v. Royal Exch. Ass. Co.*, 1 Marsh. R. 447, 448.

³ *Barclay v. Stirling*, 5 M. & Sel. 6.

⁴ *Brockelbank v. Sugrue*, 1 Mood. & Rob. 102.

⁵ *Benson v. Chapman*, 6 Man. &

Gr. 792; 5 C. B. 330; 2 H. of Lds. Cas. 696. And see the reason given in *Rosetto v. Gurney*, 11 C. B. 176.

⁶ *Shipton v. Thornton*, 9 A. & E. 314; *Matthews v. Gibbs*, 30 L. J. (Q. B.) 55.

⁷ *Kidston v. Empire Ins. Co., L. R.*, 1 C. P. 525; in error, 2 C. P. 357.

perform the contract,¹ or by timely abandonment to enable the insurer, if he choose, to perform it for his own benefit.² This is a right on the part of the insurer, with a corresponding duty on the part of the shipowner.

If there be a clear total loss of ship under the circumstances supposed, the right to recover as for a total loss of freight thereupon arises with the duty to give notice of abandonment. But if the loss on ship be not actually total, the question remains whether it be constructively total.³ It was argued in a recent case that even if it be so, as the abandonment of a ship occasioning the loss of freight was the owner's own act, he could not recover against the insurer under an averment of loss by the perils insured against. The Court of Exchequer Chamber, however, reversing the judgment of the Common Pleas, determined to the contrary, pointing out, that both in respect of ship and freight, the loss in such a case was the immediate consequence of perils within the policy.⁴ In this case also, there is a right to abandon under a policy on freight, and thereupon to recover as for a total loss.

If both ship and cargo have been justifiably sold abroad, the assured may, we have seen, without notice of abandonment, recover as for a total loss on freight. It is otherwise if the sale is unjustifiably made where the ship might have been repaired, or the cargo sent on so as to earn freight, and in such a case mere notice of abandonment unaccepted cannot alter the rights of the parties. In short, where the sale of ship and cargo is justified, notice of abandonment to the underwriter on freight is unnecessary; where such sale is not justifiable it is inoperative, unless accepted or acted upon by the insurer.

Where both
ship and
cargo are sold
abroad.

¹ *Benson v. Chapman*, 5 C. B. 330, 363; 2 H. of Lds. Cas. 696.

² See *Potter v. Rankin*, L. R., 5 C. P. 341.

³ *Green v. Royal Exch. Ass. Co.*, 6 Taunt. 66; 1 Marsh. 447; *Idle v. Royal Exch. Ass. Co.*, 3 Moore,

115; 8 Taunt. 755.

⁴ *Potter v. Rankin*, L. R., 5 C. P. 341; and *S. C.* in the Lords, per Blackburn, J., L. R., 6 Ho. of Lds. 115, 116; per Bramwell, B., *ibid.* p. 135; per Lord Chelmsford, *ibid.* p. 155.

Parmeter v.
Todhunter.

The case of *Parmeter v. Todhunter*, so often referred to on this point, seems to be very imperfectly reported. It was a policy of insurance "on the freight of the ship *Portsea*," insured from Barbice to London. The ship, in the course of her voyage, was captured, recaptured, and carried into Grenada, where she was sold with the whole of her cargo; and the plaintiff, who had given no valid notice of abandonment, claiming a total loss, it was contended that no notice was necessary, *sed non allocatur*, for the goods might have been brought home in another ship, and so freight have been earned.¹ It appears by what fell from Lord Ellenborough, that the circumstances of this case were not such as to make the sale of ship and cargo justifiable, and consequently that there was no total loss on freight.

Green v.
Royal Exch.
Ass. Co.

Green v. The Royal Exchange Assurance Company was an insurance on "freight, by the ship *Defiance*, at and from the Canary Islands to London;" the ship having sailed on her voyage, with a full cargo on board, was, in consequence of sea damage, obliged to put back, and to unship her cargo, and then the ship being found so disabled that it would be impossible to bring her home without repairs, which could not be procured where she was, both ship and cargo were sold. The purchaser of the ship repaired her, and brought her home with half a cargo; and her late captain (who was also owner and plaintiff in the action) bought another ship of small burden, in which he also brought goods to London, but none of the original cargo. Upon action brought against the underwriters on freight for a total loss, it was objected, 1. That he had given no notice of abandonment; and, 2. That the sale was not justified by necessity. Gibbs, C. J., as to the first objection, which was based on the authority of *Parmeter v. Todhunter*, held that there was nothing in it; but, as to the second, he granted a new trial, in order that the jury might consider whether the sale of the ship, under the circumstances, was such a measure as a prudent owner, if uninsured, would have resorted to; or

¹ *Parmeter v. Todhunter*, 1 Camp. 541.

whether he would not have repaired and sent her on, so as to earn freight.¹ "I think," said the Chief Justice, "the assured ought to have acted as if the adventure had not been insured; and, if a man of common prudence would have repaired her, not being insured, he should have done so on account of the underwriters, otherwise he would have been selling the ship for the purpose of throwing the loss" (of freight) "on the underwriters."²

Both points were again raised and ultimately left at large in *Idle v. Royal Exchange Assurance Company*, which was the next case in order of time. Under an insurance "on the freight of the ship *Ajax*," for a voyage from Quebec to her port of discharge in the United Kingdom, the ship and cargo were sold abroad by the master and one of the part-owners, under circumstances which, in the opinion of the Court of Common Pleas, justified the sale on the ground of urgent necessity, and that Court held that no notice of abandonment was necessary to entitle the assured on freight to recover a total loss.³ The Court of King's Bench, however, directed a *venire de novo*, on the ground that the necessity of the sale was not distinctly found in the special verdict, and could not be inferred from the facts stated; and Bayley, J., added, on the same occasion, "That the question, whether the circumstances amounted to an abandonment, might also be left open;"⁴ *i.e.*, whether, even with notice of abandonment, the assured would have had a right to recover as for a total loss on freight.

*Idle v. Royal
Exch. Ass.
Co.*

The act of abandonment implies that there is something to abandon, some property or benefit which the shipowner can cede to the insurer, and if this be absent under circumstances which would otherwise justify and require notice of abandonment, such notice being nothing but an idle form becomes in law unnecessary.

Abandonment
unnecessary
where there is
nothing to
abandon.

¹ *Green v. Royal Exch. Ass. Co.*,
6 Taunt. 66; 1 Marsh. R. 447.

² 1 Marsh. R. 452.

³ *Idle v. Royal Exch. Ass. Co.*, 3
Moore, 115; 8 Taunt. 755.

⁴ 3 Br. & B. 151, note (d).

Potter v.
Rankin.

The Sir William Eyre, being on a voyage from the Clyde to ports in New Zealand, was chartered to bring home a cargo from Calcutta, and a policy was effected to cover this homeward freight during her outward voyage and for 30 days after arrival in New Zealand. During the currency of the policy, the ship sustained such damage as could not be effectually repaired in New Zealand, and therefore, with temporary repairs, she sailed for Calcutta; but upon her arrival there it was found that the cost of her repairs would exceed her repaired value, and consequently she was abandoned to the insurers on ship. Whether the abandonment for loss on ship was then made within due time was not the question in the action, which was brought on the freight policy only. For the purposes of that policy, the ship at New Zealand was a constructive total loss; the shipowner in fact chose not to repair her, and was discharged by the effect of sea perils from any obligation to do so; there was therefore a total loss of the homeward freight from Calcutta by the constructive total loss of the ship under the policy which covered her voyage from the Clyde to New Zealand. There being in these circumstances nothing to abandon to the insurers on freight, notice of abandonment, if omitted, was properly omitted as an idle form.¹ This case having been carried to the House of Lords, the judgment there, affirming that of the Exchequer Chamber, must be taken to have quieted for ever the question revived in *Knight v. Faith*,² by deciding that notice of abandonment is unnecessary where nothing remains to be abandoned.

When ship is
sold.
Mount v.
Harrison.

This appears to have been the *ratio decidendi* in the case of *The Olive Branch*. Under a policy on freight the ship had been sold, but under circumstances of such urgent necessity as, in the opinion of the Court, fully to justify the sale; the cargo, one-third of which was loaded on board at the time of loss, and the rest engaged, was immediately sent on to

¹ *Potter v. Rankin*, on appeal, L. R., 5 C. P. 341; affirmed, L. R., 6 Ho. of Lds. 83; reversing the judgment of

the Common Pleas, L. R., 3 C. P. 562.

² *Knight v. Faith*, 15 Q. B. 649.

England in another vessel; and the plaintiff claimed a total loss on freight. It was objected that he should have given notice of abandonment, but the Court, under the circumstances of the case, thought it unnecessary, and the plaintiff recovered the whole amount of his insurance.¹

Where the original ship can be repaired in a reasonable time, or the cargo may be sent on in a substituted ship, at a reasonable amount of cost and trouble, and with a fair hope of its ultimately arriving in species or in a merchantable state at its port of destination, the master is not justified in selling; and the shipowner will not be entitled, on the ground of the master's negligence or improper conduct in selling the goods instead of forwarding them, to give notice of abandonment, and recover as for a total loss on freight.²

Where cargo is sold.

In the case of *Mordy v. Jones*, where the original ship, after putting back to refit, had been repaired so as to be capable of taking on the goods, and the goods, though sea-damaged, were capable of being forwarded, though not without involving a delay and an expense equal to the freight, it was decided in this country that the master could not, by selling instead of taking them on, entitle the shipowner to throw the loss of the freight on the underwriter.³ The expense, though equal to the freight, might yet have been far below the selling value of the goods; that therefore was not an expense such as entitled the master to sell them; but he was entitled to carry them on and to earn freight, and if he voluntarily surrenders this advantage, he cannot then turn round on the insurers of freight and claim for a loss, since the loss is not the effect of any of the perils insured against.⁴ It would be quite otherwise if such expense were

¹ *Mount v. Harrison*, 4 Bing. 388.

² See the United States cases, *Sal-tus v. Ocean Ins. Co.*, 12 Johnson, R. 107; *Bradhurst v. Columbian Ins. Co.*, 9 Johnson, R. 17; *Griswold v. New York Ins. Co.*, 1 Johnson, R. 205; 2 Phillips, nos. 1639, 1640.

³ *Mordy v. Jones*, 4 B. & Cr. 494; *Brockelbank v. Sugrue*, 1 Mood. & Rob. 102.

⁴ *Mordy v. Jones*, *supra*; *Phil-pott v. Swann*, 30 L. J. (C. P.) 358; 11 C. B. N. S. 270.

greater than the value of the goods at the port of destination; he may in that case give notice of abandonment and recover as for a total loss of freight.¹

Inability to send on the entire cargo.

Mere inability to send on the entire cargo is no case of constructive total loss on freight. A ship valued at 12,000*l.* was insured from Valparaiso to England; freight valued at 4000*l.* was insured on the same voyage by a separate policy. The ship, having sailed with a full cargo, was compelled by stress of weather to put back to Valparaiso, where the master, finding on survey that to repair her so as to bring home the entire cargo would cost more than the value of the freight, though less than the value of the ship when repaired,—sold the ship: the cargo, 800 tons, was sent on in other ships, and ultimately arrived at Liverpool, earning freight to the amount of about 3600*l.* This was held not to be a total loss, either of ship or freight.²

Where the bottomry bondholder recovers the freight.
Benson v. Chapman.

If the master instead of sending on the cargo in another vessel, or selling it where it lies, repairs the original ship on bottomry, and the repaired ship subsequently arrives before action brought, earning full freight, but subject to a lien under the bottomry bond to an amount greater than the joint value of the ship as repaired and the freight as earned, this is not a constructive total loss on freight, so as to entitle the assured, who has given timely notice of abandonment, to recover the whole amount of the insurance. Receipt of the freight by the bondholder is a receipt of freight by the assured, so that freight is not lost but actually earned, and paid into the hands of another by the plaintiff's authority.³

Effect of abandonment of ship on freight.

The effect of abandonment to the underwriters on freight, when there is a separate insurance and a separate abandonment on ship, after being the subject of vexed discussion in

¹ *Michael v. Gillespy*, 26 L. J. (C. P.) 306.

² *Moss v. Smith*, 9 C. B. 94.

³ *Benson v. Chapman*, 6 Mann. &

Gr. 792; reversed in error, *Chapman v. Benson*, 5 C. B. 330; reversal affirmed on appeal, *Benson v. Chapman*, 2 H. L. Cas. 696.

this country, has now been finally set at rest. The case supposed is, that the ship is insured with one set of underwriters, and the freight with another; a constructive total loss on ship takes place, the assured validly abandons to the underwriters on ship, and to the underwriters on freight; and the ship, after abandonment on the several interests made, and accepted by both sets of underwriters, arrives earning freight,—the question was, which set of underwriters should have the benefit of the freight so earned?

After being a good deal litigated in several cases that arose out of the Russian embargo of 1800,¹ it was finally determined in *Case v. Davidson*, that an abandonment to the underwriter on ship transfers to him not merely the hull, but the use of the ship, and the advantages resulting from that use by the completion of the voyage,—in a word, that abandonment is equivalent to a sale of the ship, and therefore operates a complete transfer of the ship and her pending engagements and rights.²

This decision of the Exchequer Chamber was fully supported by the House of Lords in the case of the ship *Laurel*, in which the principle was affirmed that “Freight, while the ship is in the course of earning it, is a benefit or advantage incident to the ship, and therefore becomes the property of the underwriters on ship, paying for a total loss.” The short state of the facts in the case was this:—*The Laurel*, in the course of a voyage from Quebec to Liverpool, struck upon an iceberg in the Atlantic on the 27th July, and was very considerably injured. She reached Liverpool, however, and while in the river there grounded outside the dock gates on the 11th of August, and was afterwards taken into dock, and on discharge of the cargo and a survey of the ship the owners abandoned to the underwriters on ship, and claimed as for a total loss. The jurors found as a fact in the case, that there

Stewart v.
Greenock
Mar. Ins. Co.

¹ *Thompson v. Rowcroft*, 4 East, 34; *Leatham v. Terry*, 3 B. & P. 479; *M'Carthy v. Abel*, 5 East, 388; *Sharp v. Gladstone*, 7 East, 24; *Ker*

v. Osborne, 9 East, 378.

² *Case v. Davidson*, 5 M. & Sel. 79; affirmed in error, *Davidson v. Case*, 2 Br. & B. 379.

was under the circumstances a total loss of *The Laurel*, which as she lay in dock was properly abandoned and not worth repairing. It was held by the House of Lords that the underwriter on the ship was entitled, on settling for a total loss, to have the benefit in account of the freight which had been received by the owner on the discharge of the cargo.¹

Scottish Mar.
Ins. Co. v.
Turner.

The shipowner, having been thus deprived of his freight by operation of law, brought his action against the underwriter on freight to recover the whole amount insured in the freight policy as for a total loss on that interest. The Court of Session gave judgment in his favour, but that decision was reversed by the House of Lords, on the simple ground that the condition of the freight policy,—that freight should be earned,—had actually been fulfilled, and the fact that the freight had been paid, not to the plaintiff (the shipowner) but to the underwriters on ship by his authority, was held to make no difference.²

“The expression, the ‘loss of freight,’” says Lord Truro, in delivering his opinion in the House, “has two meanings, and the distinction between them is material:—1. Freight may be lost, in the sense that, by the perils insured against, the ship has been prevented earning freight. 2. Freight may be lost, in the sense that, after it has been earned, the owner has been deprived of it by some circumstance unconnected with the contract between the assured and the underwriter on freight. For a loss of freight, in the first sense, the underwriter on freight is responsible; for a loss of freight, in the second sense, he is not.”³

What freight
is transferred
by abandon-
ment.

The freight transferred by abandonment, is the whole freight pending at the time of the loss, and ultimately earned by the ship. This follows from these principles—1. That an

¹ *Stewart v. Greenock Mar. Ins. Co.*, 2 H. L. Cas. 169.

388.

² *Scottish Mar. Ins. Co. v. Turner*, 1 Macq. H. L. Cas. 334; confirming the case of *M'Carthy v. Abel*, 5 East,

³ Per Lord Truro in *Scottish Mar. Ins. Co. v. Turner*, 1 Macq. H. L. Cas. 334, 340.

abandonment, if effectual, clothes the abandonee with all the rights of ownership from the moment of the loss that gave the right to abandon, and substitutes him from that time in the place of the assured;¹ 2. That freight earned under an entire contract is never apportionable, except by express stipulation beforehand, or by subsequent agreement of the parties, *e.g.*, where the freighter accepts his cargo at an intermediate port, subject to the payment of *pro rata* freight. In ordinary cases, therefore, it is the whole freight pending at the time of the loss that is transferred by abandonment.

It further follows from the principles just stated, that if the pending freight be ultimately earned by a substituted ship, the original vessel being totally disabled, the original owners, as parties to the charter-party, are the persons entitled and not the abandonees of ship,² unless these latter can show that the master in hiring another ship acted as their agent, a thing not to be presumed. Of course if there be no pending freight, although there be cargo on board, as where the assured is owner both of ship and cargo, the abandonees of ship recover nothing in the name of freight or for use of the ship, except for so much of the voyage as is accomplished with the cargo on board after the abandonment.³ In case the claims of the abandonee of ship be not enforced, the abandonee of freight, who has adjusted a total loss, may claim from the assured, as salvage, any freight ultimately earned less the necessary expenses of earning it.⁴

Our law, as fixed by the decisions, seems undoubtedly to present this anomaly, that the assured on freight may, by making a distinct contract with a third party, deprive the underwriter on freight of the salvage to which he would

In the United States.

¹ 2 Emerigon, c. xvii. s. 6, p. 232, and *ibid.* p. 256, goes further, and says it makes the abandonee owner from the commencement of the risk (*dès le principe*); but this is incorrect according to English law, see Miller v. Woodfall, *infra*.

² Hickie v. Rodocanachi, 28 L. J. (Ex.) 273; 4 H. & N. 455.

³ Miller v. Woodfall, 27 L. J. (Q. B.) 120; 8 E. & B. 493. See Brown v. North, 8 Exch. 1.

⁴ Barclay v. Stirling, 5 M. & Sel. 6.

have been entitled had no such contract been made.¹ In the United States this inconsistency is sought to be avoided by providing for an apportionment of the freight earned before, and after, the event which occasions the abandonment. The rule there has long been understood to be that, on an accepted abandonment of ship, the freight earned previous to the loss apportioned *pro ratâ itineris* is to be retained by the shipowner, or his representative, the underwriter on freight, and that only the freight earned subsequently to the time of loss vests in the abandonnee on ship.²

It certainly seems that this rule is less obnoxious to objection than our own; nor does there appear to be any great difficulty in its practical application. Thus, in a case where ship and freight had been abandoned to the respective sets of underwriters, on account of the capture of the ship after she had performed eight-ninths of the voyage insured, the Court held that the underwriters on freight were entitled, in virtue of the abandonment, to all the vessel's earnings previously to the casualty—that is to say, eight-ninths—and those on the ship to the remaining ninth.³ This case is almost identical with that put by Bayley, J., in order to illustrate the unfairness of the English rule; according to which the underwriter on the ship, in such case would receive the whole benefit and earnings of the voyage, although he would only be at a few days' expense for provisions, &c.⁴

In France.

In France, where insurances on pending freight (*fret à faire*) are prohibited, the question cannot arise as between the two sets of underwriters; but the general question as to the effect of an abandonment of the ship on pending freight has given rise to a great deal of embarrassed litigation.

¹ 2 Phillips on Ins., nos. 1649, 1740.

² 3 Kent's Com. 333; and see the cases cited by him, of which the principal are,—United Ins. Co. v. Lenox, 1 Johnson, C. 377; 2 Johnson, C. 443; Marine Ins. Co. v. United Ins. Co., 9 Johnson, R. 186. See also all the cases collected and

commented on, 2 Phillips, Ins., nos. 1738—1742.

³ Leavenworth v. Delafield, 1 Caines, 578.

⁴ In 5 M. & Sel. 86. Accord. Scottish Mar. Ins. Co. v. Turner, 1 Macq. Ho. of Lds. C. 334; ante, p. 1084.

The Ordonnance of 1681 had no specific regulation on the point, and the tribunals denied to the underwriters on ship any freight for the goods saved. Valin exposed the error, and maintained that an abandonment of the ship ought to carry with it all the freight pending and in the course of being earned at the time of the casualty, whether stipulated to be paid in advance or not; but not freight actually earned, as, for instance, where the freight of the outward passage having been earned and paid, the ship is lost in her passage home.¹

Emerigon examines the question on general principles, and concludes, with regard to freight in the course of being earned at the time of the casualty, that this passes to the abandonee of the ship just as the fruit growing in an orchard passes on sale to the vendee of the orchard. With regard to freight actually earned before the casualty, he admits that this seems to stand in the same predicament with fruit gathered before the sale of the orchard, and which, of course, would not pass to the vendee; but, finally, he determines that this freight also goes to the abandonee on ship, on the ground that the effect of an abandonment is entirely to substitute the abandonee in place of the assured from the beginning of the adventure, so as to make him proprietor of the ship and all its earnings from the commencement of the risk, and not only from the time of the casualty.² The law was so settled by the Chamber of Commerce at Marseilles in 1778.

The Ordonnance, however, of the ensuing year (1779) did not follow this doctrine, but declared that acquired freight (*fret acquis*) already earned on the voyage was insurable, and did not go with the ship on abandonment, but that the freight ultimately earned on the goods would go to the insurer, if there was no stipulation to the contrary.³ The Code de Commerce enacts that the freight of the goods saved (*fret des marchandises sauvées*), shall on abandonment vest in the

¹ Valin, Com. liv. iii., tit. vi. *des Assurances*, art. 15.

² 2 Emerigon, c. xvii. s. 9, p. 256.

³ See Emerigon, *ibid.*

abandonnee of ship, even though it may have been paid in advance.¹ The meaning of these latter words has been the subject of litigation before the French tribunals: it has been expressly laid down by the Cour Royale of Rennes,² and confirmed by the Cour de Cassation,³ that they relate only to such portion of the freight of the goods ultimately saved as may have been paid in advance under the stipulations of the charter-party: that the only freight which passes by abandonment to the insurer on the ship, is the freight of the goods on board at the time of the casualty and ultimately saved; but that the freight of goods landed previously to the casualty, under the terms of the charter-party, and thus earned before the loss, does not vest in the abandonnee of ship.⁴

The actual law in France, then, as far as relates to the effect of abandonment of ship on freight, considered apart from the interests of the underwriters on freight, appears closely to resemble our own.

Deductions
from freight
when it vests
as salvage.

Sharp v.
Gladstone.

With regard to the deductions to be made from the freight ultimately earned, when it vests as salvage in the abandonnees, the following points have been decided:—

In a case in which ship and freight, on detention under the Russian embargo of 1800, had been severally abandoned to the respective underwriters, and where it was assumed that each set of underwriters were to be considered as in the place of the assured for the respective interests insured, the shipowner claimed to make the following deductions from the freight ultimately earned before paying it over as salvage to the underwriters on freight, who had settled for and paid him a total loss:—

Claimed.

1. Expense of shipping the cargo on which the freight was paid, together with port charges and expenses of the ship

¹ Art. 336.

² 23rd August, 1823.

³ 14th December, 1825.

⁴ Blaize v. Paris General Ass. Co.,

referred to by Boulay-Paty, Comment. on Emerigon, vol. ii. p. 260, and cited at length by him in his Droit Mar., tom. iv. p. 397—417.

and crew at St. Petersburg, and at Elsinore (for payment of Sound dues); 2. Insurance on same; 3. Wages and provisions of master and crew from the time they were liberated in Russia till discharged in Liverpool; 4. Their wages during their detention under the embargo (provisions were found by the Russian government); 5. Charges paid at Liverpool on ship and cargo; 6. Insurance on ship for the homeward voyage; 7. Diminution of ship's value thereon by wear and tear.

With regard to these claims the Court held, 1. That the expense of shipping on board the homeward cargo, being altogether for the benefit of the underwriters on freight, should fall exclusively on them; 2. That the expenses of ship and crew, and the insurance thereon, the wages and provisions of the master and crew between their liberation from the embargo and the ship's discharge, and their wages during the detention, should be deducted from the salvage, and apportioned between the two sets of underwriters according to their respective interests; the wages during the detention, Lord Ellenborough intimated, might come into general average; 3. The charges on ship and cargo in the port of discharge, the cost of insuring the ship for her homeward voyage, and the diminution of her value thereon by wear and tear, the Court held must be struck out, as they could not be charged on the freight.¹ Allowed.

In another case where the ship having been cast away in the course of the voyage, and a separate abandonment made to both sets of underwriters, the abandonees on ship, in consideration of the assured's taking less than a total loss, renounced all claim to benefit of salvage; there it was held, that the underwriters on freight, who had adjusted for and paid a total loss, were entitled to the freight ultimately earned by the repaired ship's arriving with a substituted cargo, after deducting the necessary expenses of loading such *Barclay v. Stirling.*

¹ *Sharp v. Gladstone*, 7 East, 24.

cargo on board at the port of repair, and the wages of the crew during the loading: any expenses, however, incurred while the ship was detained merely for the purpose of necessary repairs were not to be deducted from the freight, but set to the account of the shipowner, to be made good by the underwriter on ship.¹

¹ *Barclay v. Stirling*, 5 M. & Sel. 6.

CHAPTER IX.

RESULTS OF A SETTLEMENT.

Adjustment of the policy	- 1091	Return of premium—	
what it is	- - - 1091	in case of fraud	- - - 1107
effect of	- - - 1092	avoidance of policy	1109
Adjustment of salvage losses	- 1097	want of interest	- 1109
mode of	- - - 1097	short interest	- 1111
Recovery back of losses paid	- 1099	double insurance	- 1113
Recovery of salvage withheld	- 1099	express stipulation	1115
Return of premium	- - 1100	Deduction of one-half per cent.	1121
in case of risk not commenced	1101	Paying premium into Court	- 1122
of illegality	- - 1105		

WHEN the amount of indemnity which the assured is entitled to receive, and the proportion of such amount which each underwriter is liable to pay on the sum by him subscribed, have been settled and ascertained, an indorsement is made on the policy, generally, in the following or some similar form:—"Adjusted the loss on this policy at £——per cent."

The policy thus indorsed is then taken round by the broker to the different underwriters, who respectively affix their initials to the memorandum, and very frequently, at the same time, strike a pen through their subscription at the foot of the policy; and the policy thus indorsed is said to be adjusted. The loss, however, is not then paid; but, by the general usage of the trade, is understood to be payable at a month or six weeks from that date. At the end of that period the amount is entered to the debit of the underwriter in the broker's books, a pen is drawn through his initials affixed to the memorandum of adjustment, and the loss is then said to be struck off, or settled in account. As between broker and underwriter, it is frequently the case that no money even then passes, the amount being merely carried to

Adjustment
of the policy
—its effect as
an admission
of liability.

What is ad-
justment.

the creditor and debtor side of their mutual accounts, the general balance of which is made up at the end of every current year; and the excess of all the losses over the sums due for premiums, or *vice versâ*, is either then paid or is suffered to run on as an item in the next year's account.

As between *broker* and *underwriter*, directly the amount of the loss is entered to his debit in the broker's books, and his initials struck off the memorandum of adjustment, the account, in respect of the policy so adjusted, is deemed to be finally settled. But as between *underwriter* and *assured*, such adjustment, notwithstanding the subscription of the underwriter to the policy, and his initials to the memorandum of adjustment, have both been struck out, is no bar to an action by the assured on the policy; unless there be satisfactory evidence of express or implied consent on his part to be bound by the adjustment, as conclusive of his claims under the policy. Even then mere erasure of the defendant's subscription to the policy (as distinct from his initials to the memorandum of adjustment) is no proof of payment, but only of settlement in account; the general practice being, as we have just seen, to strike out the signature to the policy, without any money passing at the time, on the faith of a future settlement at the month's end.¹

Effect of adjustment as an admission of underwriter's liability.

It formerly was a question how far an adjustment thus indorsed on the policy operated as an admission of the underwriter's liability. An adjustment is not even evidence of liquidated damages; "it has not the effect," said Jervis, C. J., "of determining absolutely the amount due so as to dispense with the intervention of a jury; it is an instrument or means by which a jury may be led to the conclusion that the amount adjusted is the real amount of unliquidated damages for which they are to give their verdict."² It has therefore no

¹ *Adams v. Saunders*, 4 C. & P. 25; *M. & Malk*, 373.

This is a brief *résumé* of the practice, which is described and considered

at greater length, ante, Pt. I. c. iv.

² *Luckie v. Bushby*, 12 C. B. 864; 22 L. J. (C. P.) 220.

effect of precluding the underwriter, when he has not paid the loss, from any defence denying his liability under the policy, even although he was aware, at the time of signing the adjustment, of the facts on which the defence is founded.

In the earliest case on the subject, before Lee, C. J., the indorsement on the policy being,—“Adjusted the loss on this policy at 98½ per cent., which I agree to pay one month after date,”—the Chief Justice was of opinion that such an adjustment was to be considered as a note of hand, and that plaintiff need not enter into proof of loss.¹

Adjustment
with a pro-
mise to pay.

Lord Kenyon, in all the cases of the kind that came before him at Nisi Prius, uniformly ruled that an adjustment was not conclusive where it could be shown to have been made under any misconception of the law or the fact.²

Lord Ellenborough carried out to the full, if indeed he did not extend, the same doctrine. Thus, in the first case of the kind which came before him, he allowed the defendants, notwithstanding the adjustment, to offer evidence of deviation, and that being established, he nonsuited the plaintiff.³ In the next case, concealment was set up and evidence admitted, although it appeared that, just before putting his initials to the adjustment, the defendant had read letters from the captain giving a full account of all the circumstances of the loss.⁴ At the same time the Lord Chief Justice pointed out the broad distinction that exists between cases where money is paid, and where there is only a promise to pay:—“If the money has been paid it cannot be recovered back without proof of fraud; but a promise to pay will not in general be binding unless founded on a previous liability. What is an adjustment? An admission, on the supposition of the truth of certain facts stated, that the assured are entitled to recover on the policy. An underwriter must

¹ Hogg v. Gouldney, Beawes, 310; 1 Park, Ins. 266; 2 Marshall, Ins. 642; Hewitt v. Flexney, Beawes, 308.

² Rogers v. Maylor, 1 Park, Ins. 267; 2 Marshall, Ins. 644; De Gar-

ron v. Galbraith, 1 Park, Ins. 267; Peake's Add. Cases, 37; Christian v. Coombe, 2 Esp. 489.

³ Sheriff v. Potts, 5 Esp. 95.

⁴ Herbert v. Champion, 1 Camp. 133.

" make a strong case after admitting his liability; but until he has paid the money, he is at liberty to avail himself of any defence which the facts or the law of the case will furnish."¹

In the next case, the defendant, before signing the adjustment, had read a statement, posted at Lloyd's, that the ship had chased everything she saw, and been subsequently captured, owing to the cowardice of the captain,—and remarked in reference to this statement, that, as the captain was killed, it was not likely the ship was lost by his cowardice. Lord Ellenborough, notwithstanding the adjustment, allowed the defendant, at the trial, to go into evidence of deviation by cruising, his lordship telling the jury that the adjustment could not be binding on the defendant unless the whole circumstances of the case "were all blazoned to him as they really were," and desiring them to consider whether or not, at the time of the adjustment, his attention was drawn only to the manner in which the ship was captured, and was not roused to the previous deviation, with which he afterwards became acquainted.² But, as the reporter in a very able note to this case points out, if the previous deviation had been fully brought under the defendant's notice, it is difficult to see how the adjustment should have precluded him from any just defence to the action, in accordance with the principle laid down in *Herbert v. Champion*, or how greater efficacy can be given to it than merely to shift the burden of proof from the assured to the underwriter.³

Recovery
back after
payment.

If, indeed, the defendant has actually paid the loss, with full knowledge of all the circumstances, though in ignorance of the law, he is precluded from afterwards contesting his liability in order to recover the money back.⁴ So, if a policy be adjusted for a return of premium, and the sum due in

¹ 1 Camp. 136.

Lacy, 3 Taunt. 285; *Reyner v. Hall*,

² *Shepherd v. Chewter*, 1 Camp. 274, 275.

⁴ Taunt. 725.

⁴ *Bilbie v. Lumley*, 2 East, 469.

³ See 1 Camp. 275, note; *Steel v.*

respect of such return have been actually paid under full knowledge of all the circumstances, it was ruled by Gibbs, C. J., that as this return of premium had reference to the safe termination of the risk, the assured by accepting it was precluded from all further claim under the policy.¹

But where such payment has been made under a mistake of fact the case is different; as where a policy on a ship “warranted free from capture in port,” was adjusted for a return of premium, and the premium was actually paid back on receipt of a letter stating the capture to have taken place in the port of discharge, but it afterwards turned out that this was a mistake, and that the capture had not taken place in the port of discharge within the meaning of the warranty; the Court held, that the assured was not precluded by the adjustment or repayment of the premium from recovering on the policy, though the underwriter’s initials had been struck from the indorsement, and his subscription from the face of the policy, for this must be regarded as the case of an instrument destroyed by mistake.²

Reynier v. Hall.

As we have seen, if a total loss have been adjusted and actually paid, the subsequent recovery of the thing insured undamaged, and only charged with a trifling sum as the expense of its recovery, will not entitle the underwriter to recover back the money he paid; for the loss was total at the time of the adjustment, and the money was paid under no misapprehension of the state of the facts as they then existed.³ The underwriter, however, even in the absence of abandonment, is entitled to the salvage, after deducting the expense of its recovery;⁴ unless he have waived his right thereto, as by declining an offer to abandon, and inducing the assured to take less than a total loss, on condition of his (the underwriter) renouncing all benefit of future salvage.⁵

As respects a salvage loss.

If the underwriter have adjusted and paid on account a

¹ *May v. Christie*, Holt’s N. P. 67.

⁵ *Blaaupot v. Da Costa*, 1 Eden,

² *Reynier v. Hall*, 4 Taunt. 725.

130; *Brooks v. M’Donnell*, 1 Young

³ *Da Costa v. Firth*, 4 Burr. 1966.

& C. 500.

⁴ *Ibid.*

certain percentage on his subscription, under circumstances which, at the time, amounted to a total loss, and this loss is afterwards converted into an average loss by restoration of part of the proceeds of the property lost, he will not be allowed to recover back the money so paid or any part of it, merely because, through a favourable sale of the property, the amount ultimately received by the assured under the policy and by means of salvage exceeds 100% per cent., provided the percentage paid by the underwriter does not exceed the percentage of goods ultimately lost.¹ There had been no abandonment to the insurer, and therefore the restitution converted the loss into an average loss. The adjustment on account was not in excess of the percentage of loss, so that everything restored was in favour of the assured, not of the underwriter.

Subrogation
to the Rights
and Responsi-
bilities of the
Assured.

It is rather to perfect the catalogue of the results of a settlement that here mention is made of what was considered in detail in a previous chapter,² the subrogation of the insurer to all the rights and responsibilities of the assured as owner of the subject of insurance ceded upon payment of a total loss. This cession or abandonment in case of such a settlement is proper to all contracts of indemnity, and in marine insurance, which is eminently such a contract, it has unusual prominence. In the case of a constructive total loss, abandonment, being optional with the assured, who may choose, if he will, to have it dealt with either as an average loss or as a total loss, must in the latter case be expressly made with notice. Whereas in case of a total loss absolute, the cession upon payment in full is the effect and operation of law.³ The insurer becomes thereby owner, not in his own right so as to be entitled to sue in his own name; but in right of the assured in whose name he must sue with such disadvantages

¹ *Tunno v. Edwards*, 12 East, 488;
Goldsmid v. Gillies, 4 Taunt. 803.

² Ante, Part III. Ch. VI. p. 973.

³ *Rankin v. Potter*, L. R. 6 H.

of Lds. per Blackburn, J., p. 118;
per Lord Esher, *Kaltenbach v.*
Mackenzie, 3 C. P. D. 470, 471.

as are inherent in this modified right. For we have seen, for instance, that in case the loss had been the effect of collision with another ship of the same owner, which was solely to blame, the insurer must fail in his action, that action being necessarily in the name of the assured, who of course cannot sue himself.¹ When the loss is attributable to others, his right of action, his right of property, and other incidental rights, are altogether such as vested in the assured on the happening of the loss, subject, however, to any modification or loss of these rights in consequence of the prior acts and contracts of the assured himself with others than the insurer.²

In cases of abandonment the assured, as we have seen, is entitled to the whole amount of the insurance, and the underwriter, on payment of such amount, is entitled to the net proceeds of whatever may be saved,—in other words, to the salvage, after deducting the expense of saving and recovering it. We have also seen that, even where no abandonment has been made, he is equally, on payment of a total loss, entitled to the net salvage that may ultimately come to hand. In the first case, the loss is frequently called a salvage loss with, and in the latter, a salvage loss without abandonment. The only difference between the two cases is, that, in the former, the underwriters generally at once pay the whole amount insured, and the salvage is thereupon transferred to them, and its net proceeds divided amongst them, in proportion to their several interests, in the manner already stated; in the latter case, the underwriters usually agree, in the first instance, to a payment on account, of a sum which is calculated as the probable difference between the amount insured and the net value of the salvage: should

Adjustment
of Salvage
Losses.

¹ *Simpson v. Thompson*, 3 App. C. 279.

² See *Insur. Co. v. Hadden*, 13 Q. B. D. 706, C. A.; *Tate v. Hyslop*, 15 Q. B. D. 368; *Armstrong v. North*

of England Iron S.S. Ins. Co., L. R. 5 Q. B. 244, subject to the opinion of Lord Blackburn on this latter case, 7 App. C. 333, 342.

this amount prove less than the real difference, they pay the balance of the loss after it is finally settled; if more, the assured repays the excess.¹

Loss on goods
sold sea
damaged at
intermediate
port.

This mode of adjustment is, generally speaking, only adapted to cases of total loss, either constructive or absolute: there is, however, one case of partial or average loss to which, in practice, it is frequently and properly applied—and that is, where, by the perils of the sea, the ship is disabled, and prevented from proceeding on her voyage, at some place short of her port of destination, and the cargo or that part of it which is saved, in order to prevent further deterioration, is necessarily sold at the place of the disaster: in such cases the loss is, in practice, almost always adjusted as a salvage loss, *i.e.*, each underwriter either at once pays the whole amount of his subscription, and takes his proportionate share of the net proceeds of the sale, after deducting all necessary expenses; or he pays the difference between such share and the amount by him subscribed.² In one case, where a ship, with a cargo of indigo just loaded on board, was upset and sunk in her port of loading, and the indigo, having been got out of her, was sold by auction there, at a loss of 71 per cent. on its cost price on board, the Court held, that the true principle of adjustment was to settle this as a total loss, with benefit of salvage, *i.e.*, to calculate the loss according to the difference between the invoice price of the indigo at its port of loading and the sum it fetched as sold there in its damaged state; and the loss having been adjusted by an arbitrator on this principle, the Court refused to set aside his award, although it appeared that the indigo, after the sale, had been dried and sent on by other ships to London (its port of destination), where it realized nearly as much as though it had received no injury whatever.³

¹ For examples, see *Gammon v. Beverley*, 1 Moore, 563; 8 Taunt. 119; *Russell v. Dunskey*, 6 Moore, 283.

² *Stevens on Average*, 79—81;

Benecke, Pr. of Indem. 442—447.

³ *Hardy v. Innes*, 6 Moore, 574; an award being final unless impeached for fraud or misconduct.

If, after a loss has been paid, the underwriter discovers that there was fraud, misrepresentation, or concealment in the original contract, or that there were circumstances attending the loss which, if known at the time, would have sustained a refusal to pay, he may maintain an action for money received against the assured, or the broker who has effected the policy, to recover back the sum so paid. Such payment is familiarly termed in insurance law a *foul loss*. The action in such case cannot be sustained against the broker if the latter have actually paid over the loss to the assured; in that case it should be brought against the latter. If, however, the broker has merely passed the loss in account with his principal, this is no answer to the action,¹ unless meanwhile these parties have been led by the insurer to alter their position in law, as, *e.g.*, if there have been subsequently such settlements in account as are tantamount to payment.²

Recovery
back of Losses
paid.

Payments made with full knowledge of all the facts cannot, as we have seen, be recovered back,³ nor can they if mistakenly made under compulsion of legal process;⁴ unless, indeed, there have been such fraud as when afterwards discovered enables the insurer to vacate the judgment or set aside the process of the Court.

If, after payment of a total loss, the salvage or proceeds of its sale be withheld from the underwriter, he may bring an action for money received against the assured,⁵ and recover, unless by his own act at the time of settling the loss (as by

Recovery of
Salvage with-
held.

¹ Buller v. Harrison, 2 Cowp. 565; and see the principle of law developed in the case of Cox v. Prentice, 3 M. & Sel. 344.

² Holland v. Russell, 1 B. & S. 424; 4 id. 14.

³ Bilbie v. Lumley, 2 East, 469; and note to Shepherd v. Chewter, 4

Camp. 274.

⁴ Marriot v. Hampton, 7 T. R. 269, overruling Moses v. Macfarlane, 2 Burr. 1005; and Livésay v. Rider, cited 7 T. R. 269. See Marriot v. Hampton, 2 Sm. L. C. 405.

⁵ Roux v. Salvador, 3 Bing. N. C. 288.

paying less than the whole amount of insurance in full of all demands), he have waived his claim to the salvage.¹

Return of
Premium.

Money received upon a consideration which, from any cause, except the fraud of the party paying it, happens wholly to fail, is, thereupon, money held to the use of him that paid it. The premium in marine insurance is a sum of money paid by the assured to the underwriter in consideration of his taking upon himself the risk of a sea venture.

Where the risk has not been begun, the premium is returnable.

"There are, therefore, two general rules," as Lord Mansfield expresses it, "applicable to this question. The first is, that where the risk has not been begun, whether this be owing to the fault, pleasure, or will of the assured, or any other cause, the premium shall be returned, because a policy of insurance is a contract of indemnity; the underwriter receives a premium for running the risk of indemnifying the assured, and, to whatever cause it may be owing, if he do not in fact run the risk, the consideration for which the premium was put into his hands, fails, and therefore he ought to return it. Another rule is, that if an entire risk has once commenced, there shall be no apportionment or return of premium afterwards; for though the premium is estimated and the risk depends on the nature and length of the voyage, yet, if it was commenced, though it be only for twenty-four hours, or less, the risk is run; the contract is for the entire risk, and no part of the consideration shall be returned."²

But where an entire risk has once commenced, no proportionable return of premium is to be made.

In the application, however, of these principles, much nicety of discrimination has been shown by the English Courts, especially in determining whether, in the particular case, there has been an inception of an entire risk under the policy, or whether the risk insured, and, consequently, the premium, be apportionable.

In case the risk had no inception, whatever may have been

¹ Brooks v. M'Donnell, 1 Y. & Coll. 520.

² Per Lord Mansfield, Tyrie v. Fletcher, 2 Cowp. 666.

the cause, even the neglect or fault of the assured himself, provided it be not his actual fraud, the premium is by law to be returned. The general law maritime agrees with our own on this point, and is based on the same principles.¹

In case the risk has never commenced.

The underwriter upon cargo by *The Alata*, from Philadelphia to Rochfort, thinking the vessel was overdue, reinsured on the 23rd December with the plaintiff, neither of them knowing at the time of this policy being effected that the ship had safely arrived on 14th November previous, and without damage to her cargo. Assuming that the policy had never attached, the defendant refused to pay the premium. The Court, however, held that it had attached, because the risk properly described in the policy had commenced, and although it had also terminated, that was not a fact at all relevant to the question. For, as Bramwell, L. J., pointed out, the fallacy of the argument for the defendant lay in this, that *risk* was assumed to mean *chance of loss during the voyage*, whereas in relation to the question argued, that term was used in the sense of *voyage commenced with necessary conditions to make the underwriters liable*.²

In the following cases, the inquiry was whether there were not several distinct risks, in order to apportion the return of premium to such as had not commenced.

Apportionment in case of several risks.

In the first reported case of the kind a ship was insured, "lost or not lost, at and from London to Halifax, warranted to depart with convoy from Portsmouth for the voyage;" but before the ship reached Portsmouth the convoy was gone. The underwriters refusing either to make the long insurance, or to return part of the premium, an action was brought to recover back a proportionate part of the premium for the voyage from Portsmouth to Halifax. The jury found that it was usual for the underwriter to return part, and the Court held the assured entitled to a rateable return as claimed.³

Stevenson v. Snow.

¹ See 2 Emerigon, c. xvi. s. 1, p. 186, where, as usual, all the learning that could be collected on the subject is methodically arranged. For the French law, see Ord. de la Marine, liv. iii. tit. vi. art. 37; Code de Com.

art. 349. See also 4 Boulay-Paty, Droit Mar. p. 6.

² *Bradford v. Symondson*, 7 Q. B. D. 456; *Natusch v. Hendewerk*, *ibid.* p. 460, in *notis*.

³ *Stevenson v. Snow*, 3 Barr. 1237;

*Meyer v.
Gregson.*

In the next case of the same kind a ship, insured "at and from Jamaica to Liverpool, warranted to sail on or before the 1st of August," did not sail till the 1st of September, so that by this breach of warranty the policy became invalid. A return of premium was claimed on the ground that the risk was divisible; but in the absence of any proof of usage to that effect, the Court held there could be no apportionment.¹

*Gale v.
Machell.*

A ship, insured "at and from any port or ports in Jamaica to London, following and commencing from her first arrival there, warranted to sail with convoy for the voyage from the place of rendezvous," did not sail with convoy from the rendezvous; so that the warranty was broken, and the underwriters were off the risk, at all events from the time of sailing. But some evidence being given of a usage in such cases to apportion the premium, the jury thought that one half per cent. for the risk in port at Jamaica should be retained, and the residue for the risk from Jamaica to London returned; and Lord Mansfield was of the same opinion, remarking, "That wherever there is a contingency in the voyage, the risk may be divided, and that the reason why, in such cases, there are not two policies is, that the risk 'at' is capable of exact computation."²

*Long v.
Allen.*

In the next case, goods were insured "at and from Jamaica to London, warranted to depart with convoy for the voyage, and to sail on or before the 1st of August," &c.; the ship sailed before the 1st, but without convoy; and the assured brought his action for a return of premium in respect of the voyage from Jamaica to London. The jury found for the plaintiff, and also, "that it was the constant and invariable usage in insurances at and from Jamaica to London,

1 W. Bl. 318. Lord Mansfield, afterwards, on two occasions referred to this decision, as based on the fact of there being two voyages comprised in the policy; 3 Doug. 789; 2 Cowp. 669.

¹ *Meyer v. Gregson*, 3 Doug. 402;

2 Park, Ins. 796; 2 Marshall, Ins. 666. Buller, J., in *Long v. Allen*, 4 Doug. 278; 2 Marshall, Ins. 669, says, "In *Meyer v. Gregson* no usage was found."

² *Gale v. Machell*, 2 Marshall, Ins. 667; 2 Park, Ins. 797.

warranted to depart with convoy, or to sail on or before a certain day, to return the premium, deducting half per cent., if the ship sailed without convoy or after the day prescribed ;” and this verdict was left undisturbed by the Court.¹

If the risk be entire and indivisible, and has once commenced, for instance, by the ship getting under way, the premium is acquired, though she may return the next instant and wholly abandon the voyage. Or, where the insurance is “at and from,” if the risk be entire, there can be no return of premium, though the ship may be lost while at the port waiting to take in a cargo.²

Secus, if the risk is begun.

Moses v. Pratt.

A ship insured “at and from” a port, sailed on her voyage and was lost. It afterwards appeared that she was not seaworthy for the voyage when she sailed, although sufficiently so for lying “at” the port; but the Court held that there could be no return of premium.³

Annen v. Woodman.

On the same principle, as deviation does not avoid the policy *ab initio*, but only discharges the underwriter from the time the ship leaves the course, the assured is not entitled to a return of premium for the subsequent portion of the voyage if the risk be entire.⁴

In cases of deviation.

The only difficulty, then, is in ascertaining when the risk shall be regarded as entire and indivisible; and with regard to this an important test is, its being insured for one entire premium.

Whether the risk be entire.

Where the policy is on time, and the insurance for a specified term at one entire premium, there can be no doubt; in such cases, if the risk have once commenced, though an event may happen immediately afterwards which determines the contract, there shall be no return of premium.⁵ And if a

¹ *Long v. Allen*, 4 Doug. 276; 2 Park, Ins. 797; 2 Marshall, Ins. 668. Buller, J., entirely rests this case also on the ground of usage. See *S. P.*, *Rothwell v. Cooke*, 1 B. & P. 172; and 2 Marshall, Ins. 666, note (a).

² *Moses v. Pratt*, 4 Camp. 296.

³ *Annen v. Woodman*, 3 Taunt. 299.

⁴ *Hogg v. Horner*, 2 Park, Ins. 782; *Tait v. Levi*, 14 East, 481.

⁵ *Tyrie v. Fletcher*, 2 Cowp. 666.

gross sum be given as premium, it makes no difference that it is expressed in the policy to be at so much per cent. per month; for this shall be deemed only a mode of computing the gross sum, and does not make the contract a monthly insurance.¹

Bermon v.
Woodbridge.

A ship was insured "at and from Honfleur to the coast of Angola, during her stay and trade there, and at and from thence to her port or ports of discharge in St. Domingo, and at and from St. Domingo back again to Honfleur," at a premium of eleven per cent. The ship, in sailing from Angola to St. Domingo, was guilty of a deviation, which discharged the underwriters from that time; and she was lost on her passage home from St. Domingo to Honfleur. The Court, considering that the premium was estimated at one entire sum for the whole, and also that there was nowhere any contingency at any period, out or home, mentioned in the policy which, happening or not, was to put an end to the insurance, held that the whole was one entire risk, and therefore that, as it had once begun, the whole premium was due.²

The general result of all the above cases seems to be, that where no usage is proved to the contrary, an entire premium cannot be divided and apportioned unless the risks are divided in the policy in such a manner as to show that the parties had distinct risks in contemplation.

In the United
States.

The law, as to this point, seems to be the same in the United States.³

Law in
France.

In France the law, as fixed by the 356th Article of the Code de Commerce, is, that on an insurance on goods for the round voyage, out and home, if no homeward cargo is in fact loaded on board, the underwriter shall only retain two thirds of the premium, unless there be a stipulation to the contrary.⁴ Boulay-Paty, admitting the law to be as thus fixed by the Code, yet contends, and apparently with

¹ Lorraine v. Thomlinson, 2 Doug. 585.

² Bermon v. Woodbridge, 2 Doug. 781.

³ Donath v. Ins. Co. of North America, 4 Dall. 463; cited 2 Phillips, Ins., no. 1834.

⁴ Code de Com. art. 356.

very good reason, that such a provision, in cases where the outward and homeward passages together make one entire risk, insured at one entire premium, is opposed to sound principle, and must be regarded as an anomalous exception to the general rules of Maritime Law on this subject.¹

The premium may be recovered back if there has been an entire failure of consideration; but if the consideration be illegal, for example, a wager policy, or a policy to cover illicit or prohibited trading, the law is different. In this case the general maxim, *in pari delicto potior est conditio possidentis*, becomes applicable, subject however to a distinction pointed out by Buller, J., and ever since observed, between contracts executed and executory.² When the risk is ended, the premium cannot be recovered back, notwithstanding the policy was in form or purpose illegal.³ This is the usual instance of an executed contract furnished by the cases upon this subject in marine insurance. But, contrary to the opinion of Mr. Arnould, who gives this as the only instance, it rather seems that, as affecting the right to a return of premium, the contract is executed from the moment the risk begins, as in cases where no illegality exists, so in those in which it does.

In case of illegality affecting the risk.

Where the risk has commenced and the event taken place, the application of the general principle has never been doubted. Thus, where the risk had commenced and a loss by capture taken place, under a policy void as being a reinsurance within the 19 Geo. 2, c. 37, s. 4, the Court of King's Bench decided that there could be no return of premium.⁴ So, where it appeared that the policy had been effected in this country to cover a trading with

If the risk has commenced.

¹ 4 Boulay-Paty, Droit Mar. 97— 434.
100.

² Lowry v. Bourdieu, 2 Doug. 468;
Tappenden v. Randall, 2 B. & P.
467; Aubert v. Walsh, 3 Taunt. 276;
M'Kinnell v. Robinson, 3 M. & W.

³ Lowry v. Bourdieu, *supra*; André
v. Fletcher, 3 T. R. 266.

⁴ André v. Fletcher, 3 T. R. 266;
Allkins v. Jupe, 2 C. P. D. 375.

Holland, then at war with Great Britain, and a return of premium was claimed after the risk had commenced and a loss by capture taken place, the same Court held, on the same principle, that no return could be made.¹

Ignorance of
law no ex-
cuse.

On the same ground it was held, that no return can be claimed in respect of a policy intended to cover a trade carried on in contravention of our navigation laws when they existed; and this, though the assured was a foreigner, for that fact would not excuse his ignorance of the trade laws of the country with which he effects insurances and engages in commerce.²

Ignorance of
the fact, *secus*.

It is otherwise, however, where the policy is effected in ignorance of the facts; thus, where the agent of a foreigner effected an insurance in this country after hostilities had been actually declared against Great Britain by the foreign government of which the assured was a subject, but without any knowledge of that circumstance on the part of the agent, or any possibility of knowing it at the time of effecting the policy; the Court held, that, under these circumstances, the premium should be recovered back, for the plaintiffs had paid for an insurance, from which, without any fault imputable to themselves, they could never derive any benefit.³

So, where a licence, necessary to legalize the voyage, was—without the fault or knowledge of the assured, and contrary to the opinion and expectation which he might reasonably entertain—not procured till after the ship had sailed; this was held to fall within the same principle as the case last cited, and the plaintiff was allowed a return of premium.⁴

Where, however, the want of the licence at the time of sailing was a fact within the knowledge of the assured, it was held, that he could claim no return of premium, though

¹ *Vandyck v. Hewitt*, 1 East, 96.

² *Morck v. Abel*, 3 B. & P. 35;
S. P., *Lubbock v. Potts*, 7 East, 449.

³ *Oom v. Bruce*, 12 East, 225.

⁴ *Henry v. Staniforth*, 4 Camp.

270; *S. C.*, as *Hentig v. Staniforth*,
5 M. & Sel. 122. See also *Siffken v.*
Allnutt, 1 M. & Sel. 39.

the licence was procured as soon as possible after the ship sailed.¹

Yet illegality of contract is no defence, except for a principal; a mere agent cannot stop the money and set up this as a bar to the action.² When, therefore, a loss, notwithstanding the illegality of the transaction, was paid by the underwriter to the broker of the assured, this defence failed the broker in an action by his principal to recover the money.³

Illegality no defence for an agent against his principal.

If, however, the contract be still executory, that is, if the policy have never attached, it is now established law, after much expression of regret by learned judges over this deviation, that any money paid under it, such as premium in the case of insurance, may be recovered back.⁴ But it seems to be a condition to the right of action for this end that before writ issued the assured shall, by formal notice to the underwriter, have renounced his contract. When, therefore, a policy was effected on goods by *The Audax* (a Spanish ship), or any other ship or ships, with the intention of covering an illegal shipment of cotton for Liverpool from New Orleans, a port of the United States, then at war with this country, but no shipment was ever made or other thing happened within the scope of the policy to make the risk attach; and the assured brought an action to recover back the premium on the ground of the illegality of the contract; the Court held that he could not recover, because he had not renounced the contract by notice to the underwriter before action brought.⁵

If the risk has never commenced.

Proviso.

It never has been doubted, and, indeed, on principle, is abundantly clear, that the premium must be returned,

In case of fraud—

¹ *Cowie v. Barber*, 5 M. & Sel. 16.

² *Tennant v. Elliot*, 1 B. & P. 3; *Farmer v. Russell*, *ibid.* 296; *Bousfield v. Wilson*, 16 L. J. (Ex.) 44.

³ *Tennant v. Elliot*, *supra*.

⁴ *Tappenden v. Randall*, 2 B. & P. 467; *Aubert v. Walsh*, 3 Taunt. 276.

⁵ *Palyart v. Leckie*, 6 M. & Sel. 290.

whenever the policy is rendered void by the fraud of the underwriter. As, if an insurance be made on a certain voyage "lost or not lost," when the underwriter, at the time he subscribes the policy, privately knows that the ship has arrived safe, he will be bound to restore the premium.¹ So, if the contract be void by the positive misrepresentation of the underwriter, the assured may recover back the premium;² though a mere statement of the underwriter's belief or expectation would not entitle him to do so.³

on the part of
the assured.

For some time, however, it was a subject of very fluctuating decision in the English Courts, whether the assured was or was not entitled to a return of premium where the contract was rendered void *ab initio* by his own fraud.⁴ The point, however, agreeably to truer notions of justice and good policy, is now clearly established in our English jurisprudence, that wherever the contract is avoided by gross and actual fraud on the part of the assured, whether committed by himself or his agent, there shall be no return of premium.⁵

It must be
actual fraud
of the
assured.

There must, however, be actual fraud on the part of the assured or his agent, thus to preclude him from recovering back the premium; a mere misrepresentation made without actual fraud (*i.e.*, wilful intention to deceive) does not disentitle the assured to a return of premium. "Where there is fraud," says Gibbs, C. J., "there is no return of premium, but upon a mere misrepresentation without fraud, where the risk never attached, there must be a return of premium."⁶

¹ Lord Mansfield in *Carter v. Boehm*, 3 Burr. 1909.

² *Duffell v. Wilson*, 1 Camp. 401.

³ *Pawson v. Watson*, 2 Cowp. 787; *Barber v. Fletcher*, 1 Dougl. 305.

⁴ See the cases of *Whittingham v. Thornburgh*, 2 Vernon, 206; *Da Costa v. Scanderet*, 2 P. W. 170; *Wilson v. Duckett*, 3 Burr. 1361. The first two in Chancery, and the last at common law before Lord Mansfield, are in favour of allowing

the return even in cases of gross fraud.

⁵ *Tyler v. Horne*, 2 Marshall, Ins. 661; *Chapman v. Fraser*, *ibid.* In *Tyler v. Horne* the fraud was very gross, for the assured had instructed his broker to effect the policy after receiving private information of the loss of the ship.

⁶ *Feise v. Parkinson*, 4 Taunt. 639; accord. *Anderson v. Thornton*, 8 Ex. 420.

In the same way, where the contract is avoided, *ab initio*, by the fault of the assured (under such circumstances as do not imply actual fraud), *e. g.*, in failing to comply with any warranty, either express or implied, the assured will be entitled to a return of premium. Thus, if the ship do not sail on the day prescribed, or do not depart with convoy, or be not seaworthy, and there be no fraud on the part of the assured, he may recover back the premium.¹

In case the policy become void *ab initio*.

If the policy is rendered void by the act of the assured, in making a material alteration in it after subscription, and without consent of the underwriters, the assured will not be entitled to a return of premium.²

Or by making a material alteration.

We have seen that, if the risk have once commenced, there can be no return of premium in respect of its greater or less duration; and the reason is very plain, because the degree of hazard cannot be calculated by duration, *i. e.*, it may be as great in a day as in a month. It is otherwise with the amount of the insurable interest or value at risk, it being obvious, that upon two lots of property of different values exposed to the same perils, the possibility of loss is very different; the risk, in that sense, varies with the value.

In case of want of interest.

Hence, where the assured has no interest covered by the policy, either because the interest in respect of which he insures is only a bare contingency or expectation, and not an insurable interest, or because he effects an insurance on the wrong ship; in either case he is entitled to a return of premium. The rule, in fact, is, that if, through mistake, misinformation, or any other innocent cause, an insurance be

¹ 2 Marshall, Ins. 663. Numerous cases decide this point incidentally. *Henckle v. Royal Exch. Ass. Co.*, 1 Ves. 317 (breach of warranty of neutrality); *Allen v. Long*, 2 Marshall, Ins. 668 (to sail with convoy); *Annen v. Woodman*, 3 Taunt. 299; (unseaworthiness); and *Colby v. Hunter*, 3

C. & P. 7 (warranted in port). In all these cases return of premium was claimed and allowed. The rule has been explicitly recognised in the jurisprudence of the United States; 2 Phillips, Ins., no. 1844.

² *Langhorn v. Cologan*, 4 Taunt. 329.

made without any interest whatsoever, the assured is entitled to recover back the whole premium.¹

In a case of reinsurance made in ignorance by both parties that the vessel had arrived and delivered her cargo undamaged, it was argued for the defendant, who refused to pay the premium, that under the circumstances there was no insurable interest in the defendant. The Court, however, held that this was the same question as that other argued in the case, viz., that the risk being terminated beforehand, the policy never attached, for the risk and the interest expressed or covered by the terms of the policy coexisted by intention of the parties and were covered under the plaintiff's policy.²

Where captors acquire, under the Prize Acts, a contingent insurable interest, liable, indeed, to be divested by subsequent sentence of restoration, and send home their prize under an insurance on their own account, after which, upon arrival, she is by sentence of the Court of Admiralty restored to her owners, it is yet held, that, as the risk on the ship had commenced under the policy, the assured could not claim a return of premium.³ Where they have not even a contingent insurable interest, but merely a bare expectation depending on the bounty of the Crown, and after a loss the underwriters avail themselves of the want of interest to defeat the claim on the policy, the assured are entitled to a return of premium, if there be no illegality in the voyage, nor fraud in effecting the insurance.⁴

But the contract must be rescinded without delay.

M'Culloch v. Royal Exch. Ass. Co.

In the preceding case, after a loss, the underwriters, who resisted the demand, on the ground that there was no insurable interest, were not allowed to retain the premium; but where the ship had arrived safely, earning freight, Lord Ellenborough would not allow the assured afterwards to

¹ For almost every position in this section, see the great work of Emerigon, c. xvi. *Du Ristourne*.

² *Bradford v. Symondson*, 7 Q. B. D. 456. See *S. C.*, ante, p. 1101.

³ *Boehm v. Bell*, T. R. 154.

⁴ *Routh v. Thompson*, 11 East, 428. See the later statutes relating to Naval Prize, repealing all former statutes relating thereto, 27 & 28 Vict. cc. 23, 24, and 25; 29 & 30 Vict. c. 109; 33 & 34 Vict. c. 90.

claim a return of premium, on the ground that he had no insurable interest. "The voyage," he said, "is performed; the ship has arrived in safety; the freight has been earned and paid. It strikes me as now too late to rip up the matter, and say you had no insurable interest. You might have rescinded the contract before the event; but after that has been determined in favour of the underwriters, it does not lie in your mouth to tell them they were never liable, and that the premium was a payment without consideration."¹

So much for cases turning on the mere want of insurable interest. Of course, if by mistake an insurance is effected on goods on board the wrong ship, &c., and it turns out that the assured has no scintilla of interest at risk under the policy, he will be entitled to a return of the whole premium, less the usual deduction of one half per cent.²

With regard to return of premium for short interest, over-insurance, and double insurance, the principle on which the cases depend is simply this: That if the underwriter could at any time, and under any conceivable circumstances, have been called on to pay the whole sum on which he has received premium, in such case the whole premium is earned, and there shall be no return; if, on the other hand, he could never, in any event, have thus been called on to pay the whole, but only a part of the amount of his subscription—say a half or a fourth—he ought not to retain a larger proportion than one half or one fourth of the premium, and must return the residue.³

In case of short interest or of over-insurance.

The cases in which he may be so called on to make return are, 1st, where only part of the property specified in the policy or declared on it is put on board, a proportionate return of premium must be made for short interest.⁴

¹ *M'Culloch v. Royal Exch. Ass. Co.*, 3 Camp. 406.

² *Martin v. Sitwell*, 1 Shower, 156.

³ *Stevens on Average*, 200, 203; 2 *Marshall, Ins.* 649. See this test

applied in *Fisk v. Masterman*, 8 M. & W. 165; and see also 2 *Magens*, 137, note to no. 534.

⁴ *Stevens on Average*, 204.

Where "freight" is insured generally, in a valued policy, at a gross sum on a general or seeking ship, this must be taken to mean freight on a complete cargo; and if, at the time of loss, there be less than a complete cargo on board, or contracted for and ready to be shipped, it would seem that there must be a proportionate return of premium for short interest.¹ So, in the case of an insurance "on profits," if the profits on a certain quantity of goods are insured, and only part of the goods have been at risk, it has been held that the assured is entitled to a rateable return of premium.²

Over-insurance by open policy.

The next case is, where in an open policy on goods or freight the sum insured (*i.e.* the aggregate of the different subscriptions) exceeds the value of the interest at risk—for instance, if the amount underwritten be 1000*l.*, and the insurable value of the goods on board be only 500*l.*—it is evident that the underwriters, in case of loss, could only have been called upon to pay to the extent of 500*l.*, or half the sum insured; consequently, by the rule above stated, there must be a return of half the amount of the premium. This is called a return for over-insurance.

Over-insurance by valued policy.

In valued policies, as we have already seen, the valuation, unless it be fraudulent, will not be set aside; but the assured, in case of loss, supposing the whole of the interest to which the valuation refers to have been then at risk, will be entitled either to the whole or an aliquot part of the whole sum. As, therefore, the underwriters, upon such a policy, might, in the event of a total loss, have been called upon to pay the whole sum insured, they are entitled to retain the whole premium, and no return can be made for

¹ *Forbes v. Aspinall*, 13 East, 323. The point was not determined in this case, but it appears to follow from the principles regulating return of premium. See also as to goods,

Rickman v. Carstairs, 5 B. & Ad. 661; and *Tobin v. Harford*, 32 L. J. (C. P.) 134; (in error) 34 L. J. (C. P.) 37.

² *Eyre v. Glover*, 16 East, 218.

over-insurance, though the sum in the policy may be double the value of the effects insured.¹

Where, after effecting one insurance by open policy on his property, the merchant, ignorant of its real value, and wishing to be fully protected, effects further insurances by other similar policies, with a different set of underwriters, the law of this country is that he may recover to the extent of the insurable value of the property at risk, putting whichever policies he pleases in suit, and leaving the underwriters on the different policies to contribute rateably amongst themselves to the loss. In case of double insurance, he is entitled to a rateable return of premium, proportioned to the amount by which the aggregate sum insured in all the policies exceeds the insurable value of the property at risk.

In case of double insurance.

It remains to consider how the return of premium, in such cases under open policies, is apportioned amongst the underwriters themselves.

Apportionment of return of premium among the several insurers.

In the first place, it is clear that, where the over-insurance is by a single policy, all the underwriters contribute rateably to the return of premium, without regard to the date of their subscriptions; the rule being, as laid down by Mr. Marshall, that "All the underwriters upon a policy, in which the effects are insured beyond their value, must bear any loss that may happen, and repay a part of the premium, in proportion to their respective subscriptions, without regard to the priority of their dates."²

On a single policy.

It is also stated by Emerigon, as the rule of the law maritime, and is so considered in this country, that several policies effected on the same date are considered to form but one policy; and the rule, therefore, as to the return of premium in this case is the same as in the last.³

On several policies of the same date.

¹ Stevens on Average, 200; 2 Marshall, Ins. 652, citing 2 Magens, 137, note.

² 2 Marshall, Ins. 649.

³ Emerigon, c. xvi. s. 4, p. 196. See also the case of *Fisk v. Masterman*, 8 M. & W. 165.

On several policies of different dates.

But in case several policies on the same subject have been effected on different dates, a distinction arises which Mr. Arnould overlooked, although it was pointed out by Parke, B., during the argument in *Fisk v. Masterman*.¹ If the risk underwritten was not begun till after the later policies were executed, the difference of the date ceases to be of any importance, and therefore the rule laid down by Mr. Marshall and supposed by Mr. Arnould to be discarded, applies:—"If, by several policies made without fraud, the sum insured exceed the value of the effects, the several policies will, in effect, make but one insurance, and will be good to the extent of the interest of the assured: and, in case of loss, all the underwriters on the several policies shall pay according to their respective subscriptions: and it follows from thence, that all the underwriters on the several policies would be equally bound to make a return of premium for the sum insured above the value of the effects in proportion to their respective subscriptions."²

Fisk v. Masterman.

If, however, of the several policies effected on the same subject at different dates, the earlier have attached before the later have been underwritten, the later only are subject to a claim for return of premium in case of over-insurance, because until their execution the earlier sustained a risk equal to the full amount of their subscriptions. This was determined on the following state of facts:—A merchant in New Orleans having shipped a large consignment of cottons to a Liverpool house, directed them to effect an insurance, which they immediately did, on the 12th of April, by several policies in London, to the amount of 14,150*l.*, and on the 13th of April, by several other policies, both in Liverpool and in London, to the amount of 22,300*l.* more. Thus the total amount insured was 36,450*l.*; and the value of the cottons, as fixed by the different policies, was 30,333*l.*, which left 6117*l.* as the amount of over-insurance on the aggregate of all the policies. The cottons having arrived

¹ *Fisk v. Masterman*, 8 M. & W. 165.

² 2 Marshall, Ins. 649; Stevens on Average, 206, 207, 215.

safely, the Court, after argument, decided that as, in case a loss had occurred before the policies of the 13th of April were effected, the underwriters upon the policies of the 12th of April would have been liable to the full extent of their subscriptions, they were entitled to retain the whole amount of their premiums.

The Court directed accordingly, 1. That the assured should have a return of premium to the amount of the over-insurance—such amount to be ascertained by taking into account all the policies; 2. That no return of premium was to be made in respect of the policies effected on the 12th of April; 3. But that all the underwriters who subscribed the policies of the 13th should contribute rateably to the return, in proportion to the sums insured by them respectively on that day.¹

In the United States it has become customary to insert in their policies an express stipulation to the effect that, “if the assured has made any prior insurance on the property, the insurers shall be answerable only for so much as the amount of such prior insurance may be deficient towards covering the property, and shall return the premium upon so much of the sum insured as they shall be exonerated from by such prior insurance, excepting half per cent.,” &c.²

In the United States.

It is frequently agreed between the parties, that, upon the happening of a certain event, or the performance of some stipulation, the assured shall return a part of the premium: and clauses to this effect are accordingly, in such case, inserted in the policy.

Under express stipulations.

Returns of premiums are generally stipulated to be made—if the ship sails with convoy and arrives,—or simply, if she sails with convoy; if she sail on or before a certain day; or ends the voyage short of its ultimate destination; and, in general, for anything that lessens the risk of the underwriter, who, having received a premium commensurate with

Usual stipulations.

¹ *Fisk v. Masterman*, 8 M. & W.

² *Phillips, Ins.*, no. 1839.

the extent of the whole risk for the voyage, agrees (according to the condition) to make a proportionate return, if any specified occurrence takes place to diminish that risk.¹

In case the ship sails with convoy and arrives.

The clause which has given rise to the greatest amount of discussion in our jurisprudence, is that which provides for a return of part of the premium in case the ship "sails with convoy and arrives."

The reason for this stipulation, and the meaning of the parties in inserting it, is thus expressed by Lord Mansfield: "Dangers of the sea are the same in time of peace and of war; but war introduces hazards of another sort, depending on a variety of circumstances, some known, others not, for which an additional premium must be paid. These hazards are diminished by the protection of convoy: if the assured will warrant a departure with convoy, there is a diminution of the risk; but if he will not, he pays the full premium, and in that case the underwriter says, 'If it turn out that the ship departs with convoy, I will return part of the premium.'"—"But," continues his lordship, "a ship may sail with convoy, and yet, by storm or other accident, may in a day or two lose its protection: to guard against that risk the underwriter adds in policies of the present sort, 'the ship must not only sail with convoy, but she must arrive in order to entitle you to the return.'"

The words "and arrives," do not mean that the ship shall arrive in company of the convoy; but only that she herself shall arrive. If she does, that shows either that she had convoy for the whole voyage, or did not want it.²

The construction thus put by his lordship on this clause has ever since been followed, and the arrival of the ship is now established to be the sole point on which the return of premium depends, even in policies on other interests, as "goods," "freight," &c.

¹ Stevens on Average, 194.

² Simond v. Boydell, 1 Dougl. 270, 271.

Thus, in the case of *Simond v. Boydell* itself, Lord Mansfield, upon the principles just laid down, decided, that though the policy was on goods, upon which the underwriters had paid an average loss in respect of sea damage incurred before the ship's arrival, yet, as the ship herself had sailed with convoy, and ultimately arrived safe at her port of destination, the assured, under a stipulation to return 8 per cent. if the ship "sails with convoy and arrives," was entitled to a full return of 8 per cent. calculated on the whole amount of the insurance, including therein the sum which the underwriter had paid as a loss on the damaged goods.¹

*Simond v.
Boydell.*

Upon the authority of this case Lord Kenyon decided, that in a policy on freight, with a stipulation to return 10 per cent. "if the ship sailed with convoy and arrived," the assured was entitled to the whole return, calculated on the whole amount of the insurance, because the ship, though she had been captured and recaptured on her voyage, was ultimately brought into her port of destination, subject, however, to a charge of 9l. 14s. per cent. for salvage, which the underwriters paid into Court.²

*Aguilar v.
Rodgers.*

In this case Lord Kenyon said, that in order to satisfy the meaning of the clause, the arrival of the ship should "be an arrival at the destined port in the course of the voyage;" and he intimated, that if a ship arrived at her neutral port of destination, in the possession of the enemy, or at her port in this country, as the property of other persons, after a capture, that would not be such an arrival as to entitle the assured, under this clause, to a return of premium.³

*Arriving
captured.*

If goods are insured, with a stipulation to return a certain rate of premium "if ship sails with convoy and arrives;" and the ship does sail with convoy and arrive at her port of discharge, but is there captured before she have completed the unloading of her cargo, being thus totally lost with the residue of the goods on board; the assured is nevertheless

*Captured
after arrival.*

¹ *Simond v. Boydell*, 1 Dougl. 263.

² 7 T. R. 422.

³ *Aguilar v. Rodgers*, 7 T. R. 421.

entitled to the stipulated return of premium, in addition to the whole sum insured as for a total loss.¹

In fact, in all these cases, the arrival of the ship is the sole test of the return of premium, and no regard is had by the parties to the condition of the goods, on the ship's arrival. The total or partial loss of the goods is the subject of the indemnity, and must be paid by the underwriters. "But, as to the return of the additional premium, whether the goods arrive safe or not makes no part of the question; the single principle which governs is, that in the events which have happened, the war risk has been rated too high."²

Arrival to be
at the ultimate
port of desti-
nation.

Kellner v.
Le Mesurier.

The words "and arrive" may be so used as to import arrival at the ship's ultimate port of destination, overriding several stipulations for return of different portions of the premium in respect of different portions of the voyage. Thus, a ship was insured "at and from Lisbon to Cadiz, and at and from thence to Flushing, at a premium of twenty guineas per cent., to return 8 per cent. if the ship sail with convoy from Cadiz to England, and 2 per cent. more for convoy from England to Flushing; or 10 per cent. if with convoy for the voyage and arrives." After reaching England from Cadiz with convoy, she was lost by British capture before her arrival at Flushing. Lord Ellenborough, therefore, held that no return could be claimed within the meaning of this policy, as the ship had never arrived at Flushing, her ultimate port of destination; the words "and arrives," his lordship said, annexed a condition which overrode equally all the stipulations in the policy as to returns of premium; and the true meaning of the clause was this: to return 10 per cent. if the ship sail with convoy for the voyage and arrives; if from Cadiz with convoy for England, 8 per cent.; and 2 per cent. more for convoy from England to Flushing.³

Leevin v.
Cormac.

In this case, the arrival at Flushing was held, on the true

¹ *Horncastle v. Haworth*, 2 Marshall, Ins. 681.

Boydell, 1 Dougl. 271.

² Per Lord Mansfield in *Simond v.*

³ *Kellner v. Le Mesurier*, 4 East, 396.

construction of the policy, to be a condition affecting all the preceding stipulations: where, however, the stipulation was, "to return 5 per cent. if the ship sails with convoy for Gottenburg, and arrives, and 5 per cent. more if she sails for her port of delivery and arrives;" the Court of Common Pleas thought it questionable whether a return of premium might not be due for her arrival at Gottenburg, though she never arrived at her ultimate port of delivery.¹

During the great European war and Napoleon's Continental system, a practice existed of stipulating a return of premium "for arrival."² In the only case of this kind which came before the Courts, goods were insured on Baltic risk, with the usual latitude as to touching and staying, sailing backwards and forwards, &c., "until the captain could find a port," the risk on the goods to continue till the same should there be discharged and safely landed with a warranty to be free from capture or seizure in the ship's port or ports of discharge, at a premium of fourteen guineas, to return 7 per cent. for arrival. The goods being seized on board while moored in Pillau Roads for the purpose of discharging, were held to have been seized in the ship's port of discharge within the warranty, so as to free the underwriters from liability for the loss, but to make them liable to the assured for the stipulated return of premium as in case of arrival.³

It is clear from this case that it is no objection to the claim for a return of premium that the loss was one not insured against, provided the ship have arrived.⁴

Where the words "and arrives" are not inserted, but the stipulation is simply for a return, "if the ship sails with convoy," the construction is different, and the rule of *Simond v. Boydell* will not apply.

Hence, where, under a policy on goods, with a stipulation

Stipulation to return "for arrival."

"If the ship sails with convoy."

Langhorn v. Alnutt.

¹ *Leevin v. Cormac*, 4 Taunt. 483, 295. note.

² *Stevens on Average*, 198.

³ *Dalglish v. Brooke*, 15 East,

⁴ Same rule in the United States, 2 *Phillips, Ins.*, no. 1840.

to return so much per cent. "for convoy," the assured claimed to recover the stipulated return (on the ground that the ship had sailed with convoy) in addition to a total loss, the jury refused to give it, saying that the assured had a right, in case of a total loss, to add the whole amount of premium to his invoice, and so could recover it in that shape included in the total loss. Sir James Mansfield, before whom the cause was tried, did not object to this; nor was the Court moved upon it.¹ Mr. Stevens, indeed, says, that it has been long the practice at Lloyd's never to make return upon the amount paid by the underwriter for losses, whether average or total.²

If a return of premium be stipulated in case the ship sails with convoy, and before she can do so the underwriters are discharged by a breach of warranty, the assured will, it seems, be nevertheless entitled to the stipulated return.³

What satisfies
this stipula-
tion.

Audley v.
Duff.

What constitutes a sailing with convoy so as to entitle the assured to claim a stipulated return of premium within the meaning of these clauses, may be seen by the following case:—A ship, insured "at and from Oporto to Leghorn at 12 guineas per cent., to return 6% if she sail with convoy from the coast of Portugal and arrive," sailed under convoy from Oporto to Lisbon, the general rendezvous, in order to proceed thence with the whole fleet. The Oporto fleet, however, being dispersed on its way to Lisbon, lost the convoy, on which the ship in question, then judging it for the best, ran for England, and arrived. Lord Eldon held that, upon the true construction of this clause, which only required a sailing with convoy from some part of the coast of Portugal, the assured was entitled to the stipulated return of premium by the ship having sailed with convoy from Oporto and arrived in England.⁴

"If sold or
laid up."

In the last case in the English reports on the subject of

¹ Langhorn v. Allnutt, 4 Taunt. 510; 2 Marshall, Ins. 676.

² On Average, 196.

³ Meyer v. Gregson, 2 Marshall, Ins. 682.

⁴ Audley v. Duff, 2 B. & P. 111.

this section, it was held that, under a stipulation in a time policy on ship for a return of premium, "if sold or laid up, for every uncommenced month," the assured was not entitled to a return, by reason of the ship having been laid up for several months during the year for which the policy was in force, as it appeared that she was employed again within the year: for the words *laid up*, being in connection with the word *sold*, must be taken to mean such a permanent laying up as would take place [for the rest of the year] if the ship had been sold, and would put an end to the policy.¹

Hunter v.
Wright.

These are the more ordinary stipulations of this nature, and they fully illustrate the rules applicable to cases of this kind in general. Of course it is open to the parties to stipulate that the happening of any specified event shall entitle the assured to a return of so much per cent. of the premium.²

In all those cases where the premium is returnable, either in whole or in part, it is customary to allow the underwriter one half per cent., unless, indeed, there be an express stipulation in the policy against it. Therefore, wherever it is said that the whole premium is to be returned, it is to be understood with this exception. This is a very old custom, as may be seen from the foreign laws and ancient jurists collected by Emerigon,³ and from him cited by later writers; the rule is in practice always acted upon at Lloyd's, where no stipulation is made to the contrary.⁴

Deduction of
one half per
cent.

If, indeed, the underwriter, at the time of subscription, were in fact informed, or must have known of some radical defect avoiding the contract—as if he were to insure goods when he knew of their safe arrival, or contraband goods, knowing them to be such—in these and the like cases, equity

Except where
in case of
fraudulent
conduct of
insurer.

¹ Hunter v. Wright, 10 B. & Cr. 714.

² Chap. xvi. s. 6, tom. ii. p. 201.
See also Stevens on Average, 206.

³ See e. g. Ionides v. Harford, 29 L. J. (Ex.) 36.

⁴ Stevens on Average, 206.

dictates, and the rule is, that he can have no claim to this allowance.¹

Pothier, supposing the claim to be founded on the avoidance of the contract by the act of the assured, considers that the underwriter could not deduct a half per cent. if the inception of the risk was prevented by the act of God, as by the ship or goods being destroyed by lightning, fire, or other accident after the policy was subscribed, but before it had attached.² But Emerigon and Boulay-Paty consider this a refinement, and the latter points out that the modern law expressly gives the underwriter the right to make this deduction, on the ground of indemnity (*à titre d'indemnité*) from whatever cause the avoidance of the risk may arise.³

To provide against this deduction, stipulations are frequently introduced into policies, that, under certain circumstances, the whole premium shall be returned.

Practice as to
paying the
premium into
Court.

In all cases where there is reason to suppose that the assured may be entitled to a return of premium, it is advisable to pay the premium into Court, and thereby escape liability to the general costs of the action, and so much of the costs of the trial as are necessarily incurred by the plaintiff in support of that part of his claim.⁴

Counsel need
not open for a
return of pre-
mium.

Lord Eldon, while Chief Justice of the Common Pleas, was of a different opinion as to the necessity for opening this question to the jury; but the established practice now is, that counsel for the plaintiff need in no case announce at first any intention to claim a return of premium. If the defendant's case shows that he is entitled thereto, he may claim and recover it as money received at any time before

¹ Emerigon, chap. xvi. s. 6, citing Pothier, d'Assurance, no. 18, liv. 3 to 6; 2 Valin, Comment. on Ord. des Assurances, arts. 16, 17, 38, 41.

² Traité d'Assurance, no. 181.

³ Emerigon, *quà supra*. Boulay-Paty, Conférence sur Emerigon, tom. ii. p. 203.

⁴ The practice was so settled in *Penson v. Lee*, 2 B. & P. 330.

verdict; he thus obtains the full advantage which the evidence produced entitles him to, without disparaging his own case at the outset by setting up a demand that implies a doubt, at least, of being able to sustain his principal claim.¹

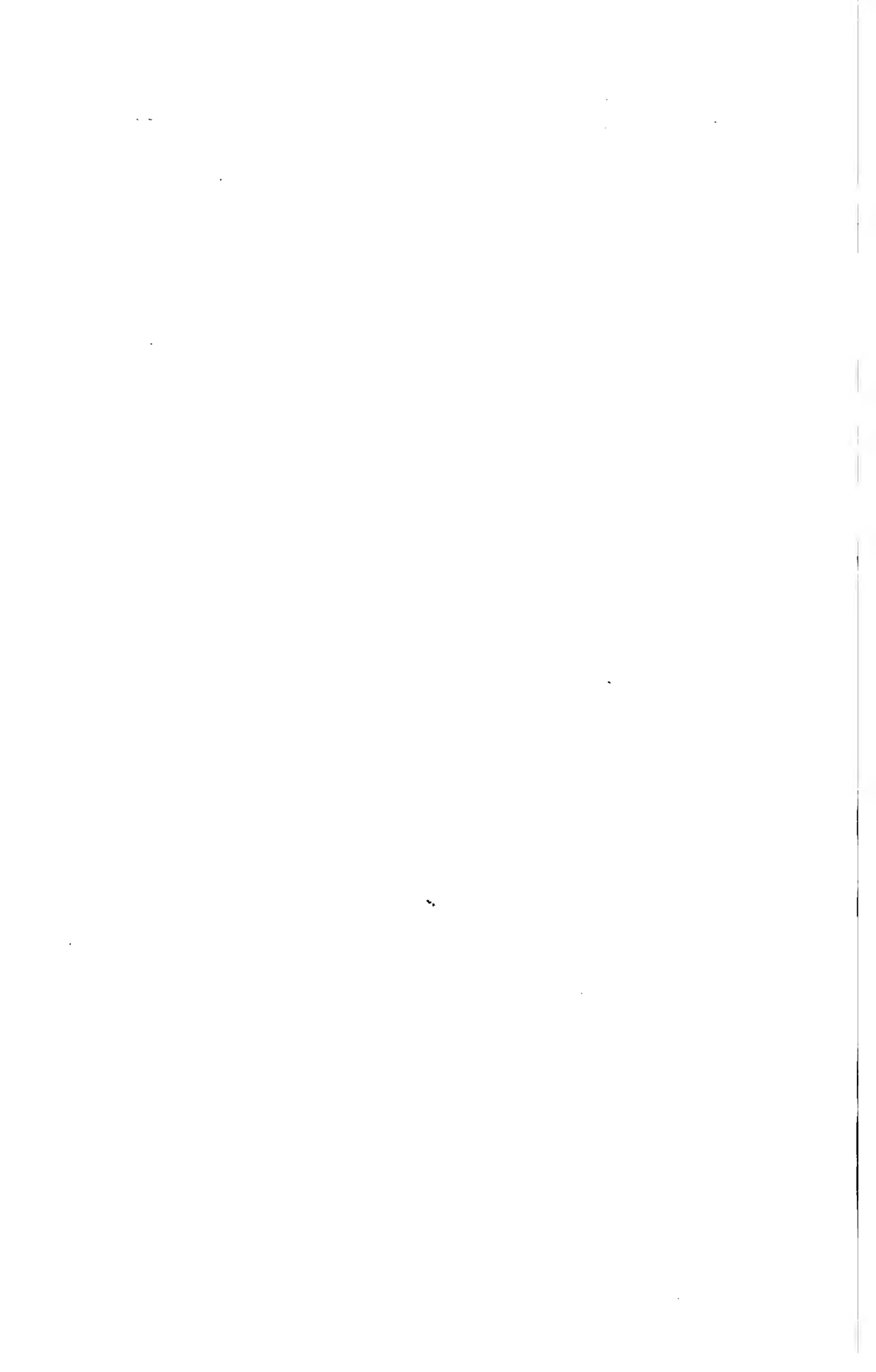
But suppose the plaintiff should, without damage to his own case on the record, be able to take this money out of Court, replying at the same time damages *ultra*, and the jury should ultimately find him entitled to his principal demand, a thing inconsistent with any title to a return of the premium, the Court will not allow him to recover more than the amount of such principal demand, less the sum taken out of Court.²

¹ 2 Marshall, Ins. 663; per Chambre, J., in *Penson v. Lee*, 2 B. & P. 333.

² *Carr v. Roy*, Exch. Ass. Co.; and *Carr v. Montefiore*, 34 L. J. (Q. B.) 21. At the same time, under the new system of pleading, it is by

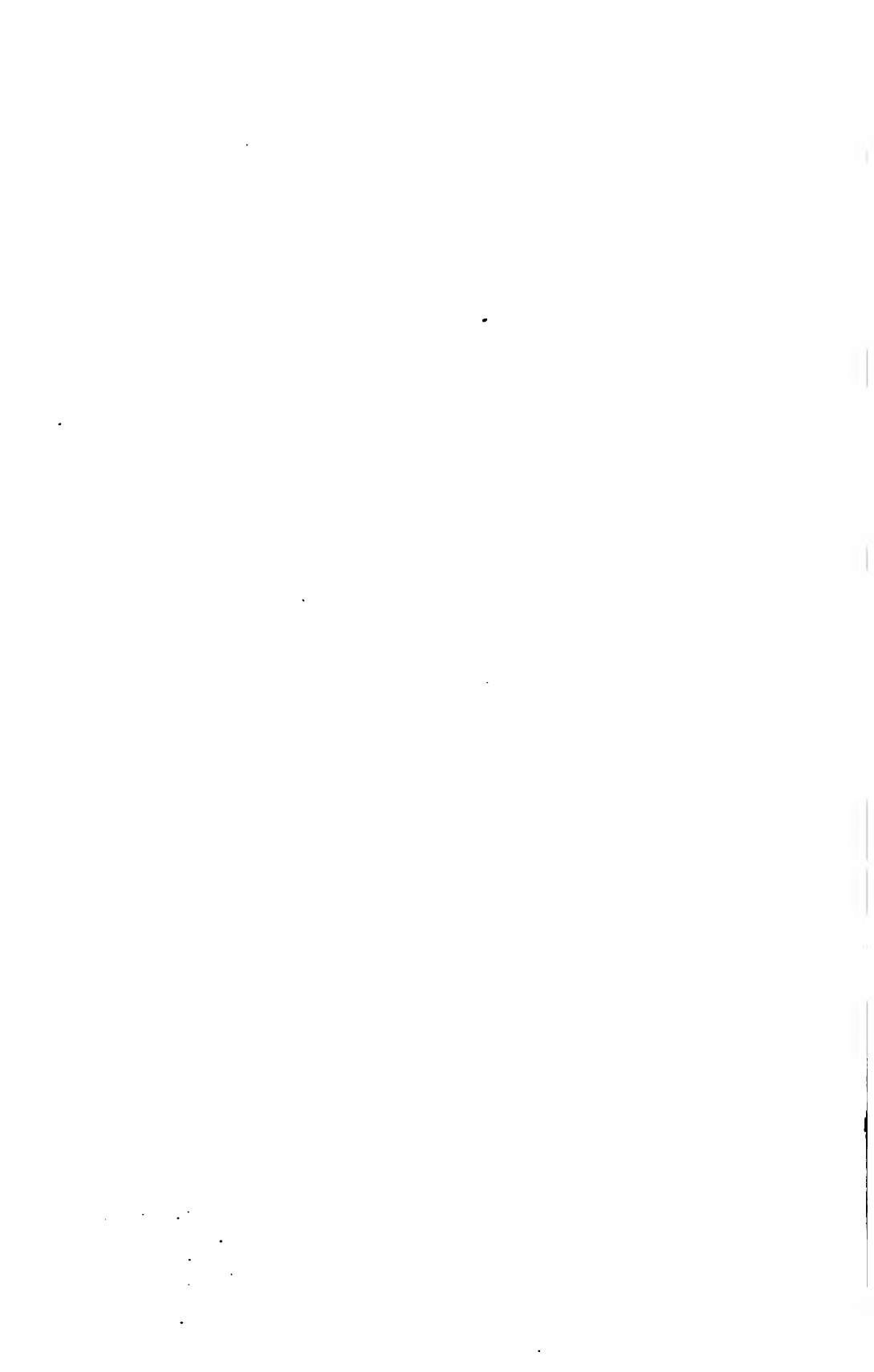
no means the same thing in effect, to reply damages *ultra* and take the money out of Court, as under the old system; and the practitioner will do well to consider in relation to the Statement of Claim what would be the effect of so doing.

Effect of
taking money
out of Court.



PART IV.

OF JURISDICTION, PROCEDURE, AND EVIDENCE.



CHAPTER I.

JURISDICTION OF THE COURTS.

Wrongs directly arising under policies of sea insurance are for the most part to be remedied by action commenced and prosecuted in the Supreme Court of Judicature. This jurisdiction cannot be ousted by any contract of the parties.¹ But if the parties were to agree that no action should be brought until it was determined by arbitration whether a loss under the policy had occurred, and what was the amount of it, this would be a valid legal contract, and a good plea in bar of any action commenced before an award had been made.²

Of the
Superior
Courts of
Law.

The simple and speedy procedure of the High Court of Justice and Court of Appeal has been sustained and improved for the purpose of dealing with contracts of this nature by certain auxiliary powers conferred by Parliament, such as to grant discovery and inspection of documents, to authorize the examination of parties on interrogatories before issue joined, and to grant commissions for the taking of evidence at home and abroad. The power to determine all questions of law and equity that may arise between the parties before the same tribunal, not the least of the improvements recently made in these Courts, will probably be found of minor importance in actions on policies of Marine Insurance, in consequence of the large infusion of equitable principles introduced into this branch of the law, as it began to take form

¹ *Kill v. Hollister*, 1 Wils. 129; *Thompson v. Charnock*, 8 T. R. 139; *Gladstone v. Osborne*, 2 C. & P. 552.

² *Scott v. Avery*, 8 Exch. 487, in error, *ibid.* 497; in the House of Lords, 5 H. L. Cas. 811; *S. C.*, 25 L. J. (Exch.) 308; *Tredwin v. Holman*, 1 H. & C. 72; *Edwards v. Aberayron Mut. Ship. Ins. Soc.*, on appeal, 1 Q. B. Div. 563.

under the moulding hand of Lord Mansfield, in perfect harmony with the strict forms of the Court in which he presided.

Equity.

Courts of Equity, as a general rule, had no direct jurisdiction in questions arising out of policies of sea insurance,¹ except where the powers of Courts of Common Law were insufficient to deal with them satisfactorily, or where the interposition of an equitable jurisdiction became necessary for the advancement of justice. Thus, in cases of manifest mistake, an Equity Court would interpose to reform the policy in accordance with what, on satisfactory evidence, appeared to have been the true intention of the parties;² it would compel a trustee to permit his name to be used in a suit at law on the policy for the benefit of the party really interested;³ or a nominal assured to assign a policy to the party for whose benefit it was effected;⁴ it would decree the specific performance of an agreement to make or renew a policy;⁵ and if the policy varied from the agreement, it would interfere and deal with the case of the assured on the footing of the agreement and not of the policy.⁶ So, where a policy had been obtained by fraud, a Court of Equity was the proper tribunal to compel the assured to surrender it to be cancelled.⁷

In one case, this Court is said to have granted an injunction, on the application of the owner of cargo, to restrain

¹ *De Ghetoff v. London Ass. Co.*, 3 Br. P. C. 525.

² *Motteux v. London Ass. Co.*, 1 Atk. 545; *Henkle v. Royal Exch. Ass. Co.*, 1 Ves. 317. The law is the same in the United States: 2 Phillips, Ins., no. 1937.

³ Per Lord Hardwicke, 1 Atk. 547.

⁴ *Scott v. Rowe*, 3 Irish Eq. R. 170.

⁵ *Perkins v. Washington Ins. Co.*, 4 Cowen, 645; 2 Phillips, Ins., no. 1937 *et seq.*; and see the *Albion Fire*

and Life Ins. Co. *v. Mills*, 3 Wils. & Shaw, 218; and the observations of Stuart, V.-C. in the *Morocco Land and Trading Co. v. Fry*, 11 L. T. N. S. 618; *Maackenzie v. Coulson*, L. R. 8 Eq. 368; and 30 & 31 Vict. c. 23, ss. 7 and 9.

⁶ *Collett v. Morrison*, 21 L. J. (Ch.) 878.

⁷ *Whittingham v. Thornbrugh*, 2 Vern. 206; *Wilson v. Duckett*, 3 Burr. 1361; *De Costa v. Scanderet*, 2 P. Wms. 170.

the master from selling it to pay debts for which the cargo owner was not answerable;¹ but it dismissed a bill for an injunction, to restrain the captain from delivering the cargo to the consignees until a contribution in general average could be adjusted.²

It seems at one time to have been considered that a Court of Equity had a peculiar jurisdiction in cases of general average contribution;³ but it was clearly settled that, whatever might have been the case on complicated questions of contribution, generally speaking, the mode of proceeding was by action at law, whether the claim were by the ship-owner against the owners of the cargo,⁴ or by one shipper of goods against another,⁵ or by either against the underwriter.⁶

¹ *Morrison v. Noorman*, Benecke, Pr. of Indem. 259.

² *Hallett v. Bonsfield*, 18 Ves. 187.

³ *Shepherd v. Wright*, Show. P. C. 18.

⁴ *Birkley v. Presgrave*, 1 East, 220; *Price v. Noble*, 4 Taunt. 123; *Trayes v. Worms*, 34 L. J. (C. P.) 274.

⁵ *Dobson v. Wilson*, 3 Camp. 480.

⁶ *Milward v. Hibbert*, 3 Q. B. 120.

CHAPTER II.

PROCEDURE.

<p>Parties to the action - - - 1130</p> <p> plaintiffs - - - 1130</p> <p> defendants - - - 1133</p> <p>Statement of Claim - - - 1135</p> <p> example - - - 1135</p> <p> chief practical points - - 1136</p> <p>Defences - - - 1136</p> <p> chief practical points - - 1137</p> <p> denial of interest - - 1137</p> <p> loss - - - 1137</p> <p> goods on board - - 1138</p> <p> contracted for - - 1138</p> <p> performance of conditions 1138</p>	<p> express - - - 1138</p> <p> implied - - - 1138</p> <p>misrepresentation - - - 1139</p> <p>concealment - - - 1139</p> <p>deviation - - - 1140</p> <p>loss before or after risk - 1140</p> <p>illegality - - - 1140</p> <p>trade usages - - - 1140</p> <p>satisfaction recovered - 1141</p> <p>settlement in account - 1141</p> <p>no plea - - - 1141</p> <p>Action dehors the policy - - 1142</p> <p>pleadings in - - - 1142</p>
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Parties to the
action.

Plaintiffs.

As, generally speaking, policies not under seal in this country are effected by brokers in their own name, for the benefit either of a named principal, or of whom it may concern, the general rule is, that the action on the policy so effected may be brought either in the name of the principal for whose benefit it was really made,¹ or of the broker who was immediately concerned in effecting it:² in fact, it is treated as the contract of the principal as well as of the agent. On the same ground, the action for a return of premium may be brought either in the name of the broker, or of the principal on whose behalf the policy was made.³

¹ *Browning v. Provincial Ins. Co. of Canada*, L. R. 5 P. C. 263; *Wolff v. Horncastle*, 1 B. & P. 316, 323; *Routh v. Thompson*, 13 East, 274; *Lucena v. Craufurd*, 2 B. & P. N. R. 269, and numerous other cases.

² *Usparicha v. Noble*, 13 East, 332; *Sargent v. Morris*, 3 B. & Ald. 277, 281; and see *Story on Agency*, 130; *Provincial Ins. Co. of Canada v. Leduc*, L. R. 6 P. C. 224.

³ *Martin v. Sitwell*, 1 Show. 156.

By statute,¹ the assignee of a policy to whom the beneficial interest therein has passed, if entitled to the property insured by it, may sue upon it in his own name, subject, however, to such defence as would have been open to the defendant against the person by whom or on whose account the policy was effected. Under assignment of policy.

Whether the action be brought in his own name or in the name of another, it must be understood that, in order to give a person not named in the policy the right of suing thereon, it must appear in evidence that he has an interest not only in the subject insured, but in the policy.² Accordingly, where a broker indorsed a general policy in his possession with the plaintiff's risk, and the defendant initialed the indorsement, it was held that the plaintiff could not put the policy in suit, as there never had been any contract made with him.³ If the interest be in a partnership, the action may be in the name of the firm.⁴

If, after the policy is effected, but before the loss, the assured assign away his interest in the subject, he cannot sue on the policy, except as trustee for the assignee, and even so, only in cases where the policy is handed over to him on the assignment, or there is an agreement that it shall be kept alive for his benefit.⁵ Where, however, the assignment is not made till after the loss, he may in all cases sue thereon as trustee for the assignee;⁶ or since the above statute, the assignee himself may sue in his own name.⁷ Where the policy contains the usual clause, "lost or not lost," the party for whose benefit it was made may sue thereon in respect of average losses that had, without his knowledge, accrued to the thing insured before he became its owner, and before the policy was effected.⁸

¹ 31 & 32 Vict. c. 86, s. 1.

² *Crawford v. Hunter*, 8 T. R. 13, 19.

³ *Watson v. Swann*, 11 C. B. N. S. 756.

⁴ *Judic. Act*, Ord. 16, R. 10.

⁵ *Powles v. Innes*, 11 M. & W. 10; *North of Eng. Oilcake Co. v. Arch-*

angel Bk. & Ins. Co., L. R. 10 Q. B. 249.

⁶ *Sparkes v. Marshall*, 2 Bing. N. C. 761.

⁷ *Lloyd v. Fleming*, L. R. 7 Q. B. 299.

⁸ *Barker v. Janson*, L. R. 3 C. P.

Under pledge
of policy.

Where the consignee of goods pledges the bill of lading with another person as security for advances made by him, upon an agreement that he (the consignee) shall effect an insurance on goods for the benefit of the pledgee, and deposit the policy with him, the pledgee may sue in his own name on the policy so effected for his benefit.¹

Who is
interested.

If a policy is made in the names of A and B, for the benefit of whom it may concern, and the whole interest is in A, he alone may sue on the policy.²

A bankrupt
plaintiff.

A policy was effected on goods from "the Havannah to a market in Europe," at 60s. premium, to return 23s. 9d. if the risk ended in the United Kingdom. The assured sold the goods while at sea, and assigned the policy; an average loss took place; and subsequently the cargo was delivered in England. The assignor afterwards became bankrupt, and upon his suing on the policy for the average loss, it was held that he might do so as trustee for the purchaser, since nothing therein had passed to his assignees in bankruptcy, in whom, however, the right of suit on the same policy for a return of premium had vested.³

Policy under
seal.

If the policy be under seal and *inter partes*, no one, by the law of this country, can put it in suit but those between whom, on the face of it, the deed is made; but if it be by deed poll, although but one person as assured is named therein, yet all who are interested in the insurance may be joined with him as plaintiffs in the action.⁴

Trading companies still frequently use a seal as being the proper form for expressing the mind of a corporation, but the seal seems in these cases to be regarded now as mere form, not necessarily creating a covenant.⁵

303; *Sutherland v. Pratt*, 11 M. & W. 296. This only applies to average, not to total, losses: *Hastie v. Couturier*, 9 Exch. 109; 5 H. L. Cas. 673.

¹ *Sutherland v. Pratt*, 12 M. & W. 16.

² *Marsh v. Robinson*, 4 Esp. 98;

Spurr v. Cass, L. R. 5 Q. B. 656.

³ *Castelli v. Boddington*, 1 E. & B. 66, 879.

⁴ *Sunderland Mar. Ins. Co. v. Kearney*, 16 Q. B. 925.

⁵ Per Blackburn, J., in *Roper v. Eng. and Scottish Mar. Ins. Co.*, MS.

In the case of mutual insurance clubs unincorporated, before the 30 Vict. c. 23, made these clubs illegal, the action must have been by the member who had sustained the loss against the defaulting member; the secretary or manager could not sue either for premiums or losses, notwithstanding there was a rule of the club or a power of attorney to that effect.¹

Under policies effected with private underwriters, the Defendants. insurers are severally and not jointly liable, each separate subscription being in fact a distinct contract. The two old companies are sued respectively as "The Governor and Company of the London Assurance," and "The Governor and Company of the Royal Exchange Assurance." Since the repeal of the monopoly by the 5 Geo. 4, c. 114, companies incorporated by special Act, or charter, or by registration under the Companies Act, 1862, are sued by their corporate name, unless other provision is made by the deed of settlement or by clause in the policy. In case the policy be subscribed in the name of a firm, the action may be against the individual partners,² or the partnership sued in the name of the firm.³

Before the Companies Act, 1862, introduced the principle of limited liability into the business of insurance as a right by the general law of the land of which companies may avail themselves, various shifts were resorted to by unincorporated partnerships to evade individual liability *in solido*. One means was, by a clause making the capital stock and funds of the company alone answerable to the assured, and further restricting the liability of each shareholder to the amount of his shares. In such a case, whether the directors

Restrictive clauses.

¹ Evans v. Hooper, 1 Q. B. Div. 45; Gray v. Pearson, L. R. 5 C. P. 568. See Redway v. Sweeting, L. R. 2 Exch. 400. See, as to their mutual rights and liabilities under a winding-up order, London Mar. Ins. Ass. (Andrews' Case), L. R. 8 Eq. 176; but whether such an order ought to

be made, *quære*. See now as to the effect of the statute, The Arthur Average Ass., 32 L. T. N. S. (coram M. R.) 525; on appeal, L. R. 10 Ch. 542.

² Reid v. Allan, 4 Exch. 326; Hallett v. Dowdall, 18 Q. B. 2.

³ Judic. Act, Ord. 16, R. 10.

subscribing the policy were personally liable, as was held in *Dawson v. Wrench*,¹ or the private shareholders, as in *Reid v. Allan*,² or the directors and shareholders indiscriminately, as in *Dowdall v. Allan*,³ seems to have been occasion of considerable doubt among the judges, as all these decisions, not always unanimously given, were upon the same form of policy. Much of that difficulty seems to have arisen from the fact of the company issuing this restrictive policy being a mere private partnership, and may be expected to be greatly modified, if not quite cleared away, by the effect of the above statute.

Shipowners'
clubs.

The shipowners' mutual assurance clubs arising at a time when the monopoly of the two old companies prevented the formation of any partnership or company for the granting of insurances, were obliged to stipulate for individual liability of the insurers, and carefully to avoid anything like responsibility for the defalcations, through bankruptcy or otherwise, of any of their number. The defendant to an action by the assured in such a club was necessarily an individual defaulting member.⁴ But if some such condition precedent as the determination of the loss and its amount by the secretary or committee of the club, be left unperformed, the remedy was under the equitable jurisdiction of the Court.⁵

In the absence of a proper policy properly stamped, there is no insurance;⁶ but if there be a proper policy it may be stamped with the requisite stamp before trial.⁷

¹ *Dawson v. Wrench*, 3 Exch. 359.

² *Reid v. Allan*, 4 Exch. 326.

³ *Dowdall v. Allan*, 18 Q. B. 2.

⁴ *Lees v. Smith*, 7 T. R. 338; *Strong v. Harvey*, 4 Bing. 304. See *Gray v. Pearson*, L. R. 5 C. P. 568; and *Evans v. Hooper*, 1 Q. B. Div. 45.

⁵ See *Bromley v. Williams*, 32 L. J. (Ch.) 716; *Harvey v. Beckwith*, 12 W. R. 819, 896; *Taylor v.*

Dean, 22 Beav. 429; *Turnbull v. Woolfe*, 3 Giff. 91; 9 Jur. N. S. 57.

⁶ 30 & 31 Vict. c. 23, ss. 7, 9; *The Arthur Average Ass.*, 32 L. T. N. S. 525; L. R. 10 Ch. 542; *London Marine Ins. Co. (Smith's Case)*, L. R. 4 Ch. App. 611, a case under the old statute.

⁷ See the statutory law affecting the stamping of policies stated ante, p. 256.

The Statement of Claim differing from a Declaration in being less formal, and in being divided into paragraphs, will necessarily contain such averments as involve or imply all those allegations of fact in the case that form the basis of the plaintiff's right of action, the absence of any of which would have made the Declaration bad on general demurrer.

The authoritative example given in Appendix C. to the Rules of the Supreme Court is as follows:—

Statement of
Claim.

Statement of
Claim on a
Policy.

1886 [*here put letter and number*].

In the High Court of Justice,
Queen's Bench Division.

Writ issued the ——— day of ———, 1886.

Between A.B., Plaintiff.
and
C.D., Defendant.

STATEMENT OF CLAIM.

The plaintiff was interested to the amount of £ ——— under a policy of insurance for that amount, dated the ——— day of ———, 1886, on the ship *Hero*, subscribed by the defendant for £ ———.

Particulars:—

1. Valued or open: Valued at £20,000.
2. Voyage: At and from Cardiff to Valparaiso.
3. [Or Time: From noon of 6th June, 1886, to noon of 6th June, 1887.]
4. Premium to defendant: £ ——— per cent.
5. Perils insured against causing loss: Of the seas.
6. Loss: Total [*or exceeding 3 per cent.*].

The plaintiff claims £ ———.

Place of Trial, Liverpool.

Signed ———.
Delivered ———.

This example to one who looks upon it with little knowledge of marine insurance law, and without reference to the multiplied details of an actual case, will probably appear to be perfunctory, *jejune*, and a thing of very easy accomplishment. Very different will be the opinion formed by those who come to it with an adequate knowledge of the law, and are familiar with the variety of points which in an actual case claim

successive attention in considering the aptest form which the business in hand ought to assume in litigation. In allegation it could not be more concise, *rem tetigit acu*; it is, therefore, singularly pregnant; so much so, that much is at first concealed even to those best able to judge until the mind adverts to the variety of possible defences to which it is open, and then it seems to involve the propositions that form the staple of the preceding pages of this treatise.

In this brief statement the following points are expressed in terms:—(1) the plaintiff's insurable interest; (2) the value of it; (3) the subject of insurance; (4) the making of a policy to cover this interest; (5) the time of making it, namely, the date of the defendant's subscription; and (6) the amount for which it was underwritten by the defendant.

This is followed by a statement as brief of those particulars which are indispensable to the working out of the results contemplated by the litigation, so plainly obvious that comment is unnecessary.

Rules.

This form whenever it is applicable must be used, or when not applicable, a form of the like character, as near as may be, must be used, subject to the penalty of costs for prolixity, when such conciseness is unnecessarily departed from.¹

The averment of performance or occurrence of all conditions precedent which used never to be omitted from Declarations is now always implied where nothing to the contrary appears; and either party intending to contest such performance or occurrence, must distinctly aver the particular condition and deny in accordance with his intention.²

Defences.

I proceed now with a brief review of the chief defences that may be set up in an action on the policy, from a consideration of which the materiality of the points in a Statement of Claim will more obviously appear.

¹ Ord. 19, rule 5.

² Ord. 19, rule 14.

These few principles, however, must be received by the defendant and the plaintiff as necessarily governing the defence or reply on all the averments contained in them. Pleading principles.

Departure in pleading, being a gross offence against sound logic, defeats the litigation by raising a false issue which is not supported by previous averments of the same party, and consequently must be struck out on order with costs.¹

Denial in defence or reply must be specific, not merely general,² and never evasive.³

Illegality, insufficiency in law, malice, fraud, knowledge or the like, and notice, must be expressly averred by the party wishing to avail himself of such matter.⁴

1. As we have seen, the Statement of Claim on a policy on property British owned, must always contain an averment of interest. If this is to be disputed, it should be denied specifically,⁵ and this, whether the interest alleged never had existed in the parties, or had been parted with before the loss.⁶ 1. Denial of interest.

In an action on a policy "lost or not lost," for an average loss on goods, it is no answer that the goods were damaged as alleged before the plaintiff acquired or had any interest in them.⁷

If the Statement of Claim on the face of it show a want of interest, *e. g.* a wagering policy, the form of the defence is that the property in the policy mentioned was and continued to be British property.⁸

2. The defendant has a good answer to the action, if he can prove that the loss did not take place by the particular peril alleged. But this may be amended even at the trial. The assured is not liable on the policy if he can show 2. Denial of loss.

¹ Ord. 19, rule 16.

² Ord. 19, rule 17.

³ Ord. 19, rule 19.

⁴ Ord. 19, rules 20, 22.

⁵ *Mills v. Campbell*, 2 Y. & C. 389.

⁶ *Stockdale v. Dunlop*, 6 M. & W.

224; *Powles v. Innes*, 11 M. & W. 10.

⁷ *Sutherland v. Pratt*, 11 M. & W. 296, 8th plea.

⁸ *Smith v. Reynolds*, 1 H. & N. 221.

that the cause of loss was not one of the perils insured against.¹

3. Denial that goods were on board.

3. If the policy, as is generally the case, expresses that the risk on goods is "to begin from the loading thereof on board the ship," such policy will only attach on goods loaded on board at the *terminus à quo*, or port of loading, named in the policy: if it expresses that the risk is to begin "from the loading of them on board the ship at any named place," it will only attach on goods loaded on board there.² The defendant may, therefore, traverse such loading on board.

For the voyage.

If his case is, that though the goods were so loaded, yet they were not intended to be carried on to the port of destination, then he should deny that the goods were loaded on board for the voyage.³

4. Denial that any goods were contracted for.

4. Although none of the goods were actually shipped on board at the time of loss, yet, if at that time they were contracted for, and ready to be so shipped, the policy on freight attaches. The defendant may deny that goods at that time were procured or contracted for as alleged.⁴

5. Denial of compliance with express warranties.

5. These are conditions expressly appearing on the face of the policy, and it is for the party, intending to set up the breach of them, to aver the particular warranty and deny its performance.⁵

6. Unseaworthiness.

6. There is no warranty of seaworthiness implied in respect of the goods themselves,⁶ or under a time policy in respect of ship;⁷ and as regards the ship under a voyage policy this warranty is satisfied if the ship was seaworthy at the

¹ *Chope v. Reynolds*, 5 C. B. N. S. 642; 28 L. J. (C. P.) 194; *Philpott v. Swann*, 11 C. B. N. S. 270; *Mordy v. Jones*, 4 B. & C. 394.

² See *Rickman v. Carstairs*, 5 B. & Ad. 651; and cases, ante, p. 379. As to what will satisfy this, see *Carr and Josling v. Montefiore*, 33 L. J. (Q. B.) 256; and ante, p. 383.

³ *Reid v. Rew*, 2 Dowl. P. C. N. S.

543.

⁴ *Devaux v. J'Anson*, 5 Bing. N. C. 519.

⁵ Ord. 19, rule 14.

⁶ *Koebel v. Saunders*, 33 L. J. (C. P.) 310; 17 C. B. N. S. 71.

⁷ *Gibson v. Small*, 4 H. of Lds. Cas. 353; *Dudgeon v. Pembroke*, 2 Appeal C. 284.

commencement of the risk on which the loss occurred.¹ But for the purposes of this warranty there may be a distinction between the port, the river navigation, and the open sea;² and between vessels of one class and of another;³ or in respect of one class of cargo and of another (for the seaworthiness of the ship is an implied warranty in a policy on goods).⁴ The vessel may be badly stowed,⁵ or insufficiently provisioned, equipped, or manned, and thereby give occasion to a defence of unseaworthiness.⁶

In *Stewart v. Wilson* non-compliance with certain rules of an insurance club was pleaded and held as amounting to unseaworthiness.⁷

7. If the defence relied on be misrepresentation, it should state concisely—1. The nature of the misrepresentation as actually made;⁸ 2. That defendant was induced thereby to subscribe the policy; 3. That plaintiff, at the time of making the representation, knew it to be false, or negligently averred it to be true,—and it may be added, if actual fraud is relied on, that he made it with the fraudulent intent to deceive, &c.⁹

8. Where the defence is concealment of a material fact, it should in substance allege—1. The truth of the fact as it really was; 2. That such fact was material to the risk; 3. That it was within the knowledge of the plaintiff, when he effected the policy; 4. That he wrongfully, improperly or fraudulently, concealed it from the defendant.¹⁰

¹ *Redman v. Wilson*, 14 M. & W. 476.

² *Dixon v. Sadler*, 5 M. & W. 414; *Biccard v. Shepherd*, 14 Moo. P. C. 471; *Annen v. Woodman*, 3 Taunt. 299; *Bouillon v. Lupton*, 33 L. J. (C. P.) 37. So, *Cohn v. Davidson*, 2 Q. B. D. 455.

³ *Knill v. Hooper*, 2 H. & N. 277; *Burges v. Wickham*, 3 B. & S. 669; *Clapham v. Langton*, 44 L. J. (Q. B.) 46.

⁴ *Biccard v. Shepherd*, 14 Moo. P. C. 471; *Foley v. Tabor*, *infra*.

⁵ *Redman v. Wilson*, 14 M. & W.

sup.; *Foley v. Tabor*, 2 F. & F. 662; *Biccard v. Shepherd*, *sup.*

⁶ *Ante*, pp. 652, 669.

⁷ *Stewart v. Wilson*, 12 M. & W. 11.

⁸ This would not be wrong, but I believe it is now unnecessary to particularize, and it is always dangerous.

⁹ *Mackintosh v. Marshall*, 11 M. & W. 166; *Bruce v. Jones*, 32 L. J. (Ex.) 132.

¹⁰ See the observations of Alderson, B., in *Elkin v. Jansen*, 13 M. & W. 664.

Concealment of time when a missing

9. "Deviation," and "Abandonment" of voyage.

9. Deviation, properly so called, unreasonable delay, unwarrantable trading, or other acts that vary the risk, must be specially pleaded; and so must the abandonment of the original voyage insured, either by giving up all thoughts of proceeding to the specified port of destination, or by engaging in an intermediate voyage inconsistent with the objects of the policy, though with an ultimate intention of afterwards proceeding to the *terminus ad quem*.¹

10. Loss not during the risk.

10. The defence may be that the risk, under the circumstances, never commenced, or (what is the same thing) that the policy never attached on the subject of insurance; or, on the other hand, the defence may be that the risk on the subject of insurance had terminated before the loss; this and the other must be specially alleged.²

11. Illegality of voyage or trading.

11. The same is to be said of illegality, whether of the trading or the voyage; when this forms the ground of defence, it must be specially pleaded.³

12. Usages of trade and customs at Lloyd's.

12. Any defence turning on the usages of trade, or at Lloyd's, &c., must be specially pleaded.

See, accordingly, pleas setting out the usage at Lloyd's as to settlement of losses in account,⁴ and pleas of a custom of London that the owner of goods carried on deck should not

ship was last seen; *Westbury v. Aberdeen*, 2 M. & W. 267; and see *Anderson v. Thornton*, 8 Exch. 428.

Concealment of time when a missing ship sailed, and also positive misrepresentation as to the same fact; *Mackintosh v. Marshall*, 11 M. & W. 116. See *Stribley v. Imperial Mar. Ins. Co.*, 1 Q. B. D. 507.

Fraud is not indispensable to the vitiating effect of concealment. See ante, p. 549.

Concealment of the date of a bill for ship's disbursements drawn by the captain of a missing ship at her port of departure the day before she sailed; *Elkin v. Jansen*, 13 M. & W. 655.

Concealment of loss of ship, *Proud-*

foot v. Montefiore, L. R. 2 Q. B. 511; *Fitzherbert v. Mather*, 1 T. R. 12; *Blackburn v. Vigors*, 55 L. J. (Q. B.) 347.

¹ *Hamilton v. Shedden*, 3 M. & W. 50; *Phillips v. Irving*, 7 M. & Gr. 325; *Bold v. Rotherham*, 8 Q. B. 781.

² *Harrison v. Ellis*, 7 E. & B. 465; *Oliverson v. Brightman*, 8 Q. B. 781.

³ *Cunard v. Hyde*, 29 L. J. (Q. B.) 6; *Wilson v. Rankin*, 34 L. J. (Q. B.) 62, affirmed in error, 35 L. J. (Q. B.) 203; *Redmond v. Smith*, 7 M. & Gr. 457; *Thompson v. Irving*, 7 M. & W. 367; Ord. 19, rules 20, 22.

⁴ *Stewart v. Aberdeen*, 4 M. & W. 211; *Sweeting v. Pearce*, 29 L. J. (C. P.) 265.

receive any contribution from the shipowner in case of their jettison: and also that the underwriters on ship should not be liable to make good any general average contribution paid by the shipowner under such circumstances.¹

Where a declaration alleged a custom of the particular trade, that goods of the kind jettisoned should be carried on deck, and the plea admitted such custom as alleged, but denied that there was any custom to pay general average on such goods when so carried, this plea, before the Common Law Procedure Act, was held bad on special demurrer, as putting in issue a conclusion of law necessarily resulting from such custom as was alleged in the declaration.²

13. Formerly, under *non assumpsit*, the defendant might show that plaintiff had already recovered to the full amount against the underwriters on another policy effected on the same interest, and for the same risk: this defence must now be specially pleaded.³

13. Recovery of loss from others.

14. We have elsewhere seen when and under what limitations the settlement of a loss in account between the broker and underwriter will be a defence to an action brought by the assured on the policy against the latter. Where such settlement in account is set up by the underwriter as a defence, either as a payment, or as an accord and satisfaction, the custom and the other facts must be concisely, but specifically, averred.⁴

14. Payment by settlement in account.

In a case upon a valued policy with declaration for a total loss and only a plea of fraud, the parties went down to trial, and before going into Court the defendant withdrew his plea. The plaintiff thereupon contended that he was entitled by

¹ *Milward v. Hibbert*, 3 Q. B. 120; *Miller v. Titherington*, 30 L. J. (Ex.) 217.

² *Gould v. Oliver*, 4 Bing. N. C. 134. See also the pleadings in *S. C.*, 2 M. & Gr. 208. *S. C.*, 2 Scott's N. R. 263. See *Miller v. Titherington*, 30 L. J. (Ex.) 217, where the

plea was of a custom not to pay notwithstanding the custom to carry alleged on the declaration.

³ As to form of such plea, *Morgan v. Price*, 4 Exch. 615; *Bruce v. Jones*, 32 L. J. (Ex.) 132.

⁴ See *Stewart v. Aberdein*, 4 M. & W. 211.

admission of the defendant, under withdrawal of his plea, to the whole sum in the policy as in case of a total loss. But the Court held him entitled only to so much as should appear upon the evidence to be the amount of the loss by the perils insured against.¹

Form of pleadings otherwise than on the policy.

As the following reference to forms of action and declarations may be of use for the assistance to be derived thence under the new system of pleading, it, with the old nomenclature, is retained :

1. Actions by broker for premiums and commissions.

1. Actions by broker for premiums and commissions.—In suing the assured for premiums, if they have not been actually paid over by the broker to the underwriter, or there be any doubt as to the assured being cognisant of the usage at Lloyd's to take settlement in account as payment, the safer mode is, to declare, not simply as for "money paid," but for "money due for premiums on policies caused and procured to be effected by the defendant."² Commissions may be recovered under a common count for work and labour, or for work and labour and commissions.³

2. Actions by underwriter to recover back losses, &c.

2. In actions by underwriter to recover back losses improperly paid, or the proceeds of salvage, after payment of total loss—the proper form is the common count for money had and received;⁴ and the same remark applies where the action is brought by the broker to recover back a loss paid to,⁵ or passed in account with the assured,⁶ under a mistake of fact.

¹ King v. Walker, 2 H. & C. 384; 3 id. 209. The declaration was on a valued policy, and for a total loss. In other words, it remains a claim for unliquidated damages, even though the loss be adjusted; therefore, it would seem that in default of pleading the plaintiff may enter interlocutory judgment, and under a writ of inquiry proceed to assess the damages; Ord. 27, rule 4.

² Power v. Butcher, 10 B. & Cr. 329; and see Dalzell v. Mair, 1 Camp. 532.

³ Power v. Butcher, 10 B. & Cr. 329. As to commissions *del credere*, see Caruthers v. Graham, 14 East, 578.

⁴ Bilbie v. Lumley, 2 East, 469; Roux v. Salvador, 3 Bing. N. C. 266.

⁵ Edgar v. Bumstead, 1 Camp. 411.

⁶ Jameson v. Swainstone, 2 Camp. 546, note.

3. In actions by the assured against the underwriter for recovery back of premiums, the declaration is for money had and received, irrespective of any fact or usage of settling in account between broker and underwriter, or of the latter having been paid the premiums.¹

3. Actions against underwriter to recover back premiums.

4. Actions brought by the assured against the broker for negligence.—The following precedents of declarations in such actions are here referred to as likely to be of practical utility:—

4. Actions against policy broker for negligence.

a. *Case* against an insurance broker for not effecting a proper alteration in policy, so as to cover a proposed alteration in the voyage.²

b. *Assumpsit* against an insurance broker for breach of implied contract, in not giving due notice to his employers of his failure to procure, on their terms, an insurance which they had specially instructed him to effect.³ In this case the Court held, that the giving such notice is part of the duty implied from the undertaking to effect an insurance, and that an actual promise to give such notice, though averred in the declaration, need not be proved.

c. *Case* against policy broker, for not procuring a stamped policy to be executed in reasonable time by an insurance company.⁴

d. In addition to these precedents, it may be useful to refer to a declaration in *Case* against the secretary of an insurance company for false representation as to the affairs of the society, whereby plaintiff was induced to effect an insurance with the company.⁵

5. Actions by shipowners or owners of goods against their

¹ Per Blackburn, J., *Xenos v. N. C.* 58.

Wickham, 33 L. J. (C. P.) 13, 18;

Dalzell v. Mair, 1 Camp. 532.

² *Chapman v. Walton*, 10 Bing. 57. 63.

³ *Callander v. Oelrichs*, 5 Bing.

⁴ *Turpin v. Bilton*, 5 M. & Gr. 455.

⁵ *Pontifex v. Bignold*, 3 M. & Gr.

5. Actions by shipowners, or owners of goods, *inter se*, for general average contribution. co-adventurers for general average contribution.—The following precedents of declarations may be found useful:—

- a. Action by shipowner against owner of goods for contribution in general average for sacrifice of tackle and expenses incurred in saving ship and cargo.¹
- b. Action by shipowner against owner of goods for ship's stores necessarily thrown overboard to save ship and cargo: action held to lie, though the jettison took place after ship was captured, and while she was in possession of the enemy.²
- c. Action by owner of goods carried on deck against shipowner for contribution by reason of their jettison, setting out a custom of trade to carry such goods on deck.³

6. Actions against the underwriters for reimbursement of sums paid in contribution.

6. Action by shipowner, or owner of goods, against underwriter to recover a proportionate share of sums paid in general average contribution: when the action is brought against the underwriter, the policy must be set out in the declaration. A very instructive precedent, both of the declaration and the subsequent pleadings in such case, will be found in the report of *Milward v. Hibbert*.⁴

¹ *Birkley v. Presgrave*, 1 East, 220.

134; see also *S. C.*, 2 Man. & Gr.

² *Price v. Noble*, 4 Taunt. 123.

208; 2 Scott's N. R. 263.

³ *Gould v. Oliver*, 4 Bing. N. C.

⁴ *Milward v. Hibbert*, 3 Q. B. 120.

CHAPTER III.

EVIDENCE.

Province of the jury	-	-	1146	Interest	-	-	-	1152
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As the rules of evidence applicable to trials on policies of insurance do not vary from those which prevail in other cases, it is proposed only to notice such points of the law of evidence as are of frequent practical occurrence in actions on policies.¹

¹ Coram Q. B., 14th Nov. 1865, in *Rayner v. Ritson*, a motion was made by Kemplay to set aside an order by Blackburn, J., at Chambers, on the plaintiff (the assured) to produce and show to the defendant (underwriter) all documents relating to the action (according to the usual form), and among others all letters of the captain to his owners. Action for a total loss, pleas traversing the policy, interest, and loss. The above order was made upon an affidavit that the said documents were material and necessary to the defence. This, it was alleged, was not sufficient within the 14 & 15 Vict. c. 99, s. 6, as it should have shown how the documents in question were related to the issues raised; and, moreover, that it was difficult to see how they could be material to the defence, as the affirmative of all the issues was upon the plaintiff. Hannen showed cause

in the first instance, resting the order entirely upon the ancient practice of the Court in policy causes, and referring to what is reported of Mansfield, C. J., 1 Camp. 562. Mr. Joseph Brown, Q. C. (*amicus curiæ*), said, it was the daily practice of the judges at Chambers to make orders similar in all respects to the order of Blackburn, J., in policy causes. By the Court, the rule was refused, as the order made was in accordance with what appeared to be the ancient practice of the Court, which practice seemed to them to be founded in justice and the necessities of the case, since otherwise the underwriter must be at the mercy of the assured, unless he would go into equity to obtain the assistance which they were now asked to refuse.—*M.S.—Reported*, 6 B. & S. 888; 35 L. J. (Q. B.) 59.

This ancient practice, in cases of marine insurance, has not been

Evidence at
the trial.

Production of
ship's papers.

Province of
the jury.

Usages.

It is within the province of the jury to determine questions of fact relating to the existence of mercantile usage, and to the use and meaning of mercantile terms. The customs of merchants, and the general and known usages of trade, when they have been ascertained and determined by a course of judicial decision, form part of the law merchant, and as such are thenceforward judicially noticed by the Courts.¹

The usages, however, of a particular trade,² or of a particular place, as the usages at Lloyd's,³ must be proved by parol evidence to the satisfaction of the jury; and whether the parties to the contract must, from their place of residence, habits of business, or other circumstances, be taken to be cognisant of the usage at Lloyd's, is also a question for the jury,⁴ according to whose finding thereon the Courts hold the parties bound or not bound by the usage. It is, however, in all cases for the Court to decide whether evidence of usage be admissible, and the principle on which they proceed in determining this point is, that such evidence is admissible only to explain what is doubtful, never to contradict what is plain.⁵

Terms of
trade.

The construction of the policy, when the meaning of its terms is ascertained, is for the Court: but the interpretation

altered by any of the changes in procedure recently introduced. Without affidavit on the part of the defendants, an order for the production of ship's papers will be made *on the plaintiffs and upon all persons interested* with a stay of proceedings meanwhile; *China Steamship Co. v. Commercial Assurance Co.*, 8 Q. B. D. 142; *West of England Bk. v. Canton Ins. Co.*, 2 Ex. D. 472; but the stay is not an absolute stay in case it appear to be impossible for the plaintiffs to comply with the order or to procure that the other persons interested should do so; *China Steamship Co. v. Commercial*

Ass. Co., *supra*; *Fraser v. Burrows*, 2 Q. B. D. 624.

¹ *Barnett v. Brandao*, 6 M. & Gr. 630.

² *Pelly v. Royal Exch. Ass. Co.*, 1 Burr. 341; *Noble v. Kennoway*, 2 Dougl. 510; *Milward v. Hibbert*, 3 Q. B. 120.

³ *Gabay v. Lloyd*, 3 B. & Cr. 793; *Lawrence v. Aberdeen*, 5 B. & Ald. 107.

⁴ *Stewart v. Aberdeen*, 4 M. & W. 211; *Sweeting v. Pearce*, 7 C. B. N. S. 449; 9 *ibid.* 534.

⁵ *Blackett v. Royal Exch. Ass. Co.*, 2 Cr. & J. 244; *Crofts v. Marshall*, 7 C. & P. 597.

to be put upon technical terms,¹ the extension given by mercantile usage to descriptions of ports or places named in the policy,² and the construction of peculiar, novel, or unusual clauses by received practice or known usage,³ is for the jury: in these cases it is for the jury to say what the meaning of the expression is; but for the Court to decide what the meaning of the contract is.⁴

The question of the materiality of a representation⁵ or concealment⁶ are questions for the jury, though the judge in such cases ought to take care that they are not misled by anything that comes out in the evidence,⁷ and the Court will grant a new trial, whenever they think the verdict against the weight of evidence.⁸ The question whether a given ship be out of time on a given voyage, seems exclusively a question for the jury.⁹

Materiality of representation and concealment.

In cases of deviation, the question, as to what is the usual or prescribed course of the voyage insured, is, generally speaking, for the jury, and is to be made out by the evidence of mercantile men. When so ascertained, the question whether, upon the whole construction of the policy, and under all the circumstances of the case, there has been what amounts to a deviation, is for the Court. It is for the jury to say, whether a given voyage has been commenced or prosecuted within a reasonable time.¹⁰

Deviation.

¹ *Houghton v. Gilbert*, 7 C. & P. 701.

² *Constable v. Noble*, 2 Taunt. 402; *Cockey v. Atkinson*, 2 B. & Ald. 460; *Robertson v. Clarke*, 1 Bing. 445; *Moxon v. Atkins*, 3 Camp. 200.

³ *Parr v. Anderson*, 6 East, 202, 207.

⁴ *Per Parke, B.*, in *Hutchinson v. Bowker*, 5 M. & W. 542.

⁵ *M'Dowall v. Fraser*, 1 Dougl. 260; *Mackintosh v. Marshall*, 11 M. & W. 121; *Duer on Representations*, 78, 196.

⁶ *Littledale v. Dixon*, 1 B. & P. N. R. 151; *Rawlins v. Desborough*, 2 Mood. & Rob. 328; *Westbury v. Aberdein*, 2 M. & W. 267.

⁷ *Mackintosh v. Marshall*, 11 M. & W. 126.

⁸ *Willes v. Glover*, 1 B. & P. N. R. 14; *Bridges v. Hunter*, 1 M. & Sel. 14.

⁹ *Littledale v. Dixon*, 1 B. & P. N. R. 151.

¹⁰ *Mount v. Larkins*, 8 Bing. 108. See also *Phillips v. Irving*, 7 M. & Gr. 325.

Seaworthi-
ness.

The question whether the ship was seaworthy when she sailed is for the jury: and whether anything has been done to dispense with the obligation of the implied warranty is for the Court.¹

Illegality.

In cases of alleged illegality for violating the laws of blockade, the question, whether actual notice of a blockade has reached the captain, is for the jury;² whether he is to be presumed in law to have had notice in consequence of a certain public notification by the government, is for the Court;³ but, whether the captain was endeavouring to break the blockade, when taken, is a question for the jury.⁴

Extent of
interest in-
tended to be
insured.

When the question turns upon the extent to which the plaintiff is entitled to recover in respect of his interest, the jury may be asked whether, in procuring the policy to be effected, he intended to protect his own interest only, or that also of other parties not named on the record, but having an interest in the subject of insurance.⁵

Constructive
total loss.

In determining whether the loss on a wreck or stranded ship is constructively total, the jury should be asked, whether a prudent owner, if uninsured, and acting on the soundest and best judgment that could be formed at the time and on the spot, would have sold or abandoned the ship as she lay, rather than attempt to repair her: if so, the loss is total.⁶ Whether notice of abandonment has been given in due time is a question for the Court.⁷

Reasonable
skill and care.

In actions against policy brokers and other agents for negligence, the questions of reasonable skill and care, due diligence, and gross negligence, must, generally speaking, be decided by the jury.⁸

¹ *Weir v. Aberdein*, 2 B. & Ald. 320.

² *Harratt v. Wise*, Dans. & Ll. 234; *Winder v. Wise*, *ibid.* 238.

³ *Naylor v. Taylor*, Dans. & Ll. 240.

⁴ *Ibid.*

⁵ *Carruthers v. Sheddon*, 6 Taunt. 14; *Irving v. Richardson*, 2 B. & Ad.

193.

⁶ *Farnworth v. Hyde*, 34 L. J. (C. P.) 207; *Irving v. Manning*, 1 H. of Lds. Cas.

⁷ *Kemp v. Halliday*, 34 L. J. (Q. B.) 233; *King v. Walker*, 3 H. & C. 209; *Kaltenbach v. Mackenzie*, 3 C. P. D. 467.

⁸ See *ante*, Pt. I., Chap. IV.

A policy of marine insurance which is not stamped or not sufficiently stamped is now allowed to be stamped after execution thereof, for the purpose of being given in evidence, on payment of a penalty of 100*l*.¹

Proof of the
policy.

The allegation that the policy was effected by the nominal assured as agent for the party interested, must, under the provisions of the statute 28 Geo. 3, c. 56, be substantially proved as laid.²

Proof of the
making of the
policy.

In the leading case on this subject, the allegation that the policy was effected by the plaintiffs as agents for one Lund and for his use and benefit, was held to be sustained by proof, that plaintiffs had effected the policy as general agents for Lund, and consignees of the bill of lading; and that Lund, after being informed of their having effected the policy on his behalf, had written to approve of their having done so.³ The main principle acted upon in this case, and illustrated more or less by most of the subsequent decisions on the point, is, that subsequent ratification of the insurance by the principal on whose behalf it is effected is equivalent to a prior order, on his part, to insure—*omnis ratihabitio retrotrahitur, et mandato æquiparatur*.⁴

Agency for
assured.

Ratification.

In one of these cases, where the action was brought by the foreign principal, on a policy effected in the name of an insurance broker, in the common form, Lord Ellenborough held that the production of a letter, directing the insurance, written to the broker by the plaintiff from abroad with the English ship-letter post-mark upon it, and the date of the

¹ 39 Vict. c. 6, s. 2.

² *Watson v. Swann*, 11 C. B. N. S. 756.

³ *Wolff v. Horncastle*, 1 B. & P. 316.

⁴ *Lucena v. Craufurd*, 3 B. & P. N. R. 269; *S. C.* on *venire de novo*,

1 Taunt. 325; *Stirling v. Thompson*, 13 East, 620, 623; *Routh v. Thompson*, 13 East, 274; *Routh v. Thompson*, 11 East, 428; *Bell v. Janson*, 1 M. & Sel. 201; *Hagedorn v. Oliverson*, 2 M. & Sel. 485.

year in which the policy was effected, was sufficient proof of an averment in the declaration, that such broker was "the person residing in Great Britain who received the order for and effected the policy."¹

After verdict, it will be intended that sufficient proof has been given that the plaintiffs effected the policy as agents for the party really interested, or gave the order for insurance, or in some way or other brought themselves within some one of the descriptions of the 28 Geo. 3, c. 56: Lord Ellenborough, therefore, refused to arrest judgment in an action on a policy though it appeared on the face of the declaration that the plaintiffs on the record were neither the persons named in the policy nor the parties interested.²

Agency for insurer.

Unless admitted, as is very generally the case, the subscription of the policy must be proved in the usual way. Where the underwriter's signature has actually been written by himself, no difficulty can arise; where, however, as not unfrequently occurs, the policy has been subscribed by brokers, or other agents on his behalf, a question may arise as to the authority of the agent. As to this, proof that the agent had often subscribed policies in defendant's name, and that the defendant had held him out to the world as properly authorized for that purpose, was held by Lord Kenyon sufficient evidence of an authority to sign, without proof of any written authority so to do.³ Lord Ellenborough, in one case, seems to have thought this proof not sufficient;⁴ but admitted it to be so in another, when coupled with the additional fact, that the defendant had been in the habit of paying losses on policies so subscribed.⁵ Proof that the agent of an insurance company was in the habit of signing other memoranda of a similar nature, was held sufficient

¹ *Arcangelo v. Thompson*, 2 Camp. 620. See further as to evidence of ratification, and as to what amounts to ratification, ante, p. 164.

² *Mellish v. Bell*, 15 East, 4.

³ *Neal v. Irving*, 1 Esp. 61.

⁴ *Courteen v. Touse*, 1 Camp. 43.

⁵ *Haughton v. Ewbank*, 4 Camp. 88.

proof of his authority to sign a memorandum for a change of voyage indorsed on the policy¹

It is, it seems, to be presumed, that an agent who has authority to subscribe a policy, has also authority to sign the adjustment of a loss.²

Proof of subscription by an authorized agent will satisfy an allegation of signature by the defendant.³

The private limitations on the authority of the insurer's agent to underwrite are binding on the assured, notwithstanding his ignorance of the limits, if it appear in evidence to be notorious that all similar agents in the same locality are limited in their authority.⁴

The assured, in order to prove the policy, produced in evidence what purported to be a copy received from the defendant's broker. It was objected on the part of the defendant that this was inadmissible in evidence because a stamped original never had existed, and interlocutory evidence to that effect was offered on the instant. But the judge refused to determine that question in the way of an interlocutory point, as it went to the whole cause of action; he admitted the copy, received the evidence on the part of the defendant in its own order, and submitted the point as one of the questions in the case to the jury. The Court in Banc approved of this course as right.⁵

All warranties being conditions precedent to the policy attaching, must, if traversed by plea, be proved to have been complied with; but, perhaps, *prima facie* proof of compliance will be sufficient, until it is rebutted by counter-proof on the side of the defendant.

Proof of compliance with warranties.

¹ Brockelbank v. Sugrue, 5 C. & P. 21. See further as to the due execution of an authority to sign policies, Guthrie v. Armstrong, 1 Dowl. & Ryl. 248; Mead v. Davison, 3 A. & E. 303.

² Richardson v. Anderson, 1 Camp. 43, note; and per Blackburn, J.,

Xenos v. Wickham, 33 L. J. (C. P.) 13—19.

³ Nicholson v. Croft, 2 Burr. 1188.

⁴ Baines v. Ewing, L. R. 1 Exch. 320.

⁵ Stowe v. Querner, L. R. 5 Exch. 155. See 30 & 31 Vict. c. 23. s. 15.

Thus, under a warranty that the ship insured was Danish, it being proved by the assured that the captain addressed himself to the Danish Consul at the port of departure, that he carried Danish colours when he left it, and that he still had the same colours, surmounted by those of the captors, when brought by them into an intermediate port—Lord Ellenborough said, that this was sufficient *primâ facie* evidence of national character, so as to entitle the jury, in the absence of proof to the contrary, to find that the ship really was Danish according to the warranty.¹ The official letter of the commander of the convoy, and the log-book of the convoying man-of-war, were held admissible by Chief Baron Eyre² and by Lord Ellenborough,³ to prove compliance with a warranty to sail with convoy.

Whether it is for the assured to prove the ship to have been seaworthy at the commencement of the risk, or whether it lies on the defendant to give proof that she was then unseaworthy, is a question that will be considered presently.

Proof of
interest.

Primâ facie
proof for.

Upon a policy on ship, the possession of the assured as owner is *primâ facie* evidence of property, but a traverse of that fact may render it necessary for the assured to prove additional facts, especially that the ship is registered in his name. Thus where it was proved by the captain that the assured were the persons by whom, as owners, he was appointed and employed—this was held to be sufficient *primâ facie* evidence of ownership; and, though it afterwards appeared, by his answers, on cross-examination, that the ownership was derived to the assured under a bill of sale executed by himself as attorney to the former owner, it was further held that it did not, on this account, become necessary to produce the bill of sale or the ship's register, or to give any further proof of property beyond the mere fact of ownership,

¹ *Arcangelo v. Thompson*, 2 Camp. 620.

² *D'Israeli v. Jowett*, 1 Esp. 427.

³ *Watson v. King*, 4 Camp. 272.

no contrary proof having been adduced on the other side.¹ To the same effect it was ruled by Lord Kenyon that evidence of the assured having exercised acts of ownership in directing the loading, &c., of the ship and paying the people employed was sufficient proof of interest;² and by Lord Ellenborough that evidence that the party in whom interest was averred, had ordered and paid for stores, &c., was sufficient *prima facie* proof of his ownership, though it came out, on cross-examination, that he had derived his title under a bill of sale which was not produced.³

Now, however, since the Merchant Shipping Act of 1854, the proper document of title is the register. As to that it is enacted, that "Every register of or declaration made in pursuance of the second part of this Act in respect of any British ship may be proved in any Court of Justice, or before any person having by law or by consent of parties authority to receive evidence, either by the production of the original or by an examined copy thereof, or by a copy thereof purporting to be certified under the hand of the registrar or other person having the charge of the original; which certified copies he is hereby required to furnish to any person applying at a reasonable time for the same, upon payment of one shilling for each such certified copy; and every such register, or copy of a register, and also every certificate of registry of any British ship, purporting to be signed by the registrar or other proper officer, shall be received in evidence in any Court of Justice, or before any person having by law or by consent of parties authority to receive evidence as *prima facie* proof of all the matters contained or recited in such register when the register or such copy is produced, and of all the matters contained in or indorsed on such certificate of registry, and purporting to be authenticated by the signature of a registrar, when such certificate is produced."⁴

Register as
document of
title.

How proved.

An agent, after accounting with his principals, and

¹ Robertson v. French, 4 East, 130.

² Amery v. Rodgers, 1 Esp. 208.

³ Thomas v. Foyle, 5 Esp. 88.

⁴ 17 & 18 Vict. c. 104, s. 107.

Agent cannot
deny his
principal.

receiving money in that capacity, cannot dispute their title, and say that he did not receive the money for them, but for some other person. Hence, where a broker, after having become sole registered owner of a ship, which had been previously owned by one of two parties, effected an insurance on the partnership account, and accounted with the partnership for the premiums, it was held that he could not set up his title on the register as a defence to an action for money had and received brought by the partnership, to recover the amount of a loss which had been paid by the underwriter to him, as the agent of both partners.¹

Proof of in-
surable in-
terest in
freight.

Interest in freight is proved by evidence of an interest in the ship, as owner, charterer, or otherwise, and by showing that a charterparty was made, goods shipped, or that there was some contract entered into, or act done, whereby an insurable interest in freight accrued.²

Proof of in-
surable in-
terest in
goods.

Interest in goods is proved either as in the case of ship by evidence of possession or of acts of ownership; or by transfer of title to the assured under bill of lading, or other document; or by evidence of payment of the price.

Bill of lading.

The bill of lading is the usual evidence of the ownership of property shipped: the consignee or his assignee being presumed to be the owner where it is not otherwise expressed in the bill of lading.³ This document, being merely an acknowledgment by the master, is no evidence in an action on the policy without authentication,⁴ and some evidence that the goods specified in it were actually shipped on board.⁵ If it be subscribed "contents unknown," such bill of lading is not evidence, either of the quantity of the goods, or of the insurable interest of the consignee; nor can such document be proved as an admission, by proving the handwriting of

¹ *Dixon v. Hamond*, 2 B. & Ald. 310. See *Hickie v. Rodocanachi*, 4 H. & N. 455.

² *Camden v. Anderson*, 5 T. Rep. 709; *Etches v. Aldan*, 1 M. & Ry. 167.

³ *Hibbert v. Carter*, 1 T. Rep. 745;

Caldwell v. Ball, 1 T. Rep. 205. See the observations of Lord Campbell in *Gurney v. Behrend*, 3 E. & B. 622; *MacLachlan on Shipping*, 374 *et seq.*

⁴ *Dickson v. Lodge*, 1 Stark. 226.

⁵ *M'Andrew v. Bell*, 1 Esp. 373.

the deceased master.¹ Whether the bill of lading, even as between the consignee and shipowner, can ever be conclusive evidence of the shipment of the goods, seems very doubtful.² It has been decided that it is not so, where the action is by the consignee (but not the indorsee) against the shipowner for non-delivery; and the bill of lading, when produced, shows the shipment to have been made by a third party who was the plaintiff's agent.³

Payment of price of the goods is satisfactory evidence of insurable interest; hence, a bill of parcels, with the vendor's receipt, for goods sold abroad, was, very early, held to be sufficient proof of interest;⁴ so, the fact that consignees have given their acceptance to the consignors for the price, and on account of the goods, especially if coupled with proof of payment, would, it seems, be satisfactory evidence.⁵

To prove that the goods insured were shipped, a clerk in the custom-house produced the copy of an official paper, containing an account of the cargo as examined by the searcher; the official paper goes with the ship, and the copy is kept at the custom-house: *Chambre, J.*, ruled this copy to be admissible, without calling the searcher, as being a paper made by the appointed officer under the authority of an Act of Parliament, and lodged as an official document in the custom-house.⁶

In an action upon a policy on bottomry and respondentia loans, evidence of the execution of the bond, and of the interest of the borrower in the ship or goods, is sufficient proof of the interest of the assured, and the borrower himself was, even before Lord Denman's Act, and *a fortiori* would be so

¹ *Haddow v. Parry*, 3 Taunt. 303. In this case Lawrence, J., seemed to think that the bill of lading, without the limiting words, would have been sufficient proof of an insurable interest in the goods, i. e. that they had been shipped on board.

² All that is done by the Bills of Lading Act is to make this acknowledgment conclusive against "the

master, or other person signing the same," 18 & 19 Vict. c. 111, s. 3. See *Grant v. Norway*, 10 C. B. 665.

³ *Berkley v. Watling*, 7 A. & E. 29.

⁴ *Russel v. Boehm*, 2 Str. 1127.

⁵ See *Davies v. Reynolds*, 1 Stark. 115.

⁶ *Johnson v. Ward*, 6 Esp. 47.

now, a competent witness to prove his own interest in the ship or goods, by hypothecating which he raised the loan.¹

Respondentia
bond no proof
of interest in
goods, except
by usage.

But in a policy on goods a respondentia bond is no proof of interest in the goods on which the money was borrowed;² though by the usage of the East India trade, proof of money laid out by the captain in the course of the voyage, and for which he charged respondentia interest, was held to be proof of insurable interest in a policy "on goods, specie, and effects."³

Amount of
interest.

Under a general averment of interest in the entire thing insured, the plaintiff may prove an interest in part, and recover *pro tanto*: thus, where one of four part owners of a ship having insured her freight generally in an open policy, and averred his interest generally, without specifying it to be in only an aliquot part of the freight, it was held, that he might recover in proportion to the amount of interest he proved.⁴ So, *a fortiori*, if the plaintiff prove a greater interest than he has alleged in his Statement of Claim, this shall not preclude him from recovering to the extent of the interest he has alleged.⁵

Where a plaintiff, only interested in one-fourth of a ship, declared for a total loss of the entire ship, and proved only a partial loss, he was held entitled to recover in proportion to the partial loss on his fourth.⁶

In open poli-
cies.

In open policies the plaintiff must prove the actual value of the thing insured at the commencement of the risk: in policies on ship, this must be done generally by the evidence of surveyors who can speak to the ship's condition at, or about, the commencement of the risk; in policies on goods, generally speaking, by the production of the invoice, bill of lading, &c.

¹ *Glover v. Black*, 1 W. Bl. 396.

Ins. 738.

² *Glover v. Black*, 3 Burr. 1394; 1 W. Bl. 406, 422.

³ *Page v. Rogers*, 2 Marsh. on Ins. 739.

⁴ *Gregory v. Christie*, 3 Dougl. 419.

⁵ *Gardiner v. Crossdale*, 2 Burr. 904; 1 W. Bl. 198.

⁶ *Rising v. Burnett*, 2 Marsh. on

In valued policies, supposing the whole of the subject to which the valuation was intended to apply to have been once at risk under the policy, the value in the policy, as we have elsewhere seen, is conclusive as between the assured and the underwriters, whether in case of total or of average loss. In case of average loss it constitutes the amount upon which the percentage of damage or depreciation is calculated, in order to ascertain the indemnity to which the assured is entitled. In case of total loss it is itself the exact measure of that indemnity; and however much it may exceed the actual value of the subject insured, can never, unless fraudulent, be set aside, on that ground alone.¹ In such cases, therefore, the plaintiff need never give any proof of the amount of his interest; but merely the fact that he had some interest of a substantial nature, in a subject corresponding to and satisfying the description in the policy.² But if under valued policies on goods or freight, the whole of the goods to which the valuation was intended to apply have never been at risk under the policy and at the time of loss, proof must be given of the proportion which the goods actually on board, at the time of loss, bore to the whole quantity of the intended cargo; and this proportion must be applied to the agreed value in the policy, in order to ascertain the amount of indemnity.³

In valued policies.

With regard to the proof of interest in the parties in whom it is averred in the statement of claim, the point has already been so fully considered, that very little need be added in this place.

Parties in whom interest is vested.

If the alternative mode of averment have been adopted, proof of interest in any of the parties named will be sufficient: otherwise, the proof must still correspond strictly with

¹ *Barker v. Janson*, L. R. 3 C. P. 303; *Irving v. Manning*, 1 H. L. Cas. 817.

² *Lewis v. Rucker*, 2 Burr. 1167, 1171; *Grant v. Parkinson*, 3 Dougl.

16.

³ *Forbes v. Aspinall*, 13 East, 323; *Rickman v. Carstairs*, 5 B. & Ad. 651; *Tobin v. Harford*, in error, 34 L. J. (C. P.) 37.

the averment, on the principle, as stated by Lord Ellenborough, that a disclosure of the real interest intended to be covered by the policy, ought to be made, not only in order to apprise the underwriter whose case he is to meet, but as a matter of public policy and convenience.¹

In addition to the cases before cited, as to the necessity of proving interest as laid, the following may be inserted as showing the nature of the proof required:—The plaintiff averred his interest to be in A. and B., and in “certain persons trading under the firm of W. and J. Bell and Co.,” on motion for a rule to show cause why judgment should not be arrested, because it was not proved who were the members of that firm, the rule was refused, the Court holding it sufficient to prove that there was such a firm, and that they were interested in the goods, without proving the names of all the members.²

With regard to the time at which the interest of the party must be shown to have accrued, we have seen that it is sufficient to prove that he was interested during the risk and at the time of loss;³ and even, in cases of average loss, under a policy containing the clause “lost or not lost,” it will be sufficient to aver and prove that he was interested, although at a time subsequent to the happening of the loss.⁴ The policy does not pass by an assignment of the ship or goods; and if such assignment take place before the loss, an action cannot be brought on the policy on behalf of the assignee, averring interest in him, unless there have been an agreement between the parties to keep the policy alive for the benefit of the assignee.⁵ Assignment, however, of his

¹ *Bell v. Ansley*, 16 East, 141; 10.

Cohen v. Hannam, 5 Taunt. 101;
Carruthers v. Sheddon, 6 Taunt. 14;

Powles v. Innes, 11 M. & W. 10.

² *Wright v. Welbie*, 1 Chitt. R. 49.

³ *Rhind v. Wilkinson*, 2 Taunt. 237; *Powles v. Innes*, 11 M. & W.

⁴ *Sutherland v. Pratt*, 11 M. & W. 296.

⁵ *Powles v. Innes*, 11 M. & W. 10;
North of Eng. Oil Cake Co. v. Archangel Marit. Ins. Co., L. R. 10 Q. B. 249.

interest after the loss, will not prevent the assignor from suing on the policy in his own name, or by an agent averring the interest in himself.¹

The assignee of the policy, if the subject insured have also been assigned to him, may now sue in his own name;² and if the assignment of the policy be after loss, the assignee may sue without averring assignment to him of the subject insured.³

As we have elsewhere seen, before a loss can be recovered from the underwriter, it must be shown to have taken place within the period, or local limits of the risk or voyage insured. Hence the averments that the ship was at the port, or had sailed on the voyage, or that the goods were loaded on board, before the loss, must be substantially proved as laid. This may be done by the testimony of the master or other officer acquainted with the circumstances, or by means of written directions transmitted to the master, or by licences, charter-parties, entrances, clearances, convoy bonds, &c., preparatory to the departure of the ship, and indicating her destination.⁴

It must be proved that the ship had sailed on the voyage insured; or if the loss should take place "at" the port where the risk is made to commence, then that the ship was at such port on the voyage insured.⁵ Where the ship has foundered at sea, this proof of her having sailed on the voyage insured, frequently presents some difficulty. The following points have been decided as to the sufficiency of the evidence. To prove that a ship, insured at and from Portsmouth to Quebec, had sailed for the latter place, a witness was called, who stated that he had seen the ship in Stokes Bay, going out with the other ships from Spithead, and that she had never since been

¹ *Sparkes v. Marshall*, 2 Bing. 299.
N. C. 761.

⁴ *Stark. on Evidence*, vol. iii. p. 873, 3rd ed.

² 31 & 32 Vict. c. 86, s. 1.

³ *Lloyd v. Fleming*, L. R. 7 Q. B.

⁵ *Cohen v. Hinckley*, 2 Camp. 51.

Production of
convoy bond.

heard of; Lord Ellenborough held this insufficient. The convoy bond, from the custom-house, was then produced, with these words at the bottom of it—"convoy bond for Quebec;" and an officer from the customs said, that it was in the course of office to write these words on the bond, and that, though he did not know of any act of office being done on it, yet he had no doubt that the papers, for a voyage to Quebec, were delivered to the captain before sailing; Lord Ellenborough held this good *primâ facie* evidence that the ship had sailed on the voyage insured.¹ In the same case, Lord Ellenborough

Of charter-
party, or
clearances.

said that if it could be shown that the ship had a particular destination by charterparty, he should presume that she sailed on the chartered voyage; so, on proof that she had cleared out for a particular port the presumption would be, that she had sailed for it when she dropped from her moorings.²

Of licence.

A licence to carry a cargo to a place named in the policy as the port of destination, is *primâ facie* evidence that the ship, when she left her port of outfit, sailed on the voyage insured;³ so is a letter received by the owners, in this country, from their correspondents at the foreign port of destination, stating that the ship had not then arrived there, but was expected in a few days.⁴

Of letter from
correspond-
ents abroad.

What is in-
sufficient
evidence for
this purpose.

In order to prove, under a policy on goods, that the ship had sailed on a voyage from Leghorn to Lisbon, the plaintiff called a packer, resident in Leghorn, who stated that he had packed the goods at the warehouse of the shipper, and, by his orders, delivered them to a boatman, to go by the ship; the boatman was also called, who stated that he, by the shipper's orders, had delivered them on board the ship, and taken a receipt for them from the captain, whom he knew; and that he had heard, both from the shipper and the captain, that the vessel was bound for Lisbon. Abbott, C. J., held that this was not even *primâ facie* evidence that the ship ever sailed for Lisbon.⁵

¹ Cohen v. Hinckley, 2 Camp. 61.

⁴ Twemlow v. Oswin, 2 Camp. 85.

² Ibid. 52.

⁵ Koster v. Innes, Ry. & Mood.

³ Marshall v. Parker, 2 Camp. 69. 333.

Where the averment was that the ship sailed after the making of the policy, and the proof was that she sailed before, the variance was held to be immaterial:¹ a shipping entry at the custom-house has been admitted to show the time of the ship's sailing.² Time of sailing.

In case of goods, the inception of the risk is the loading of them on board; and this must be proved either by direct testimony of the fact, or by the bill of lading, duly authenticated, and connected with the particular subject of insurance, in the way already specified.³ Proof, also, must be given that the loss took place within the period of the risk, or the limits of the voyage insured. Thus, where it appeared that the ship, after being turned away from her port of destination, sailed on another voyage not protected by the policy, and no proof was given whether the damage sustained by the goods had accrued on the first or the second of these two voyages, Lord Ellenborough directed a nonsuit, on the ground that there was no distinct evidence that the goods were injured while protected by the policy.⁴ On goods.

Loss on goods accrued upon the risk, or voyage, insured.

With regard to freight, the inception of the risk in cases where it is secured by charterparty, is proved by evidence of the commencement of performance under the charterparty.⁵ In other cases it is proved either by showing that all the goods were actually loaded on board, or that part of them was so, and the rest contracted for and ready to be shipped;⁶ and that the ship, at the time of loss, was ready to receive them.⁷ If the plaintiff relies on a contract to ship the goods on freight, he must be prepared to show that such contract is On freight.

¹ *Peppin v. Solomons*, 5 T. Rep. 496.

² *Hughes v. Wilson*, 1 Stark. Rep. 180.

³ *Ante*, p. 1154.

⁴ *Parkin v. Tunno*, 2 Camp. 59.

⁵ See *Thompson v. Taylor*, 6 T. R. 478, 483; *Horncastle v. Suart*, 7

East, 400; *Foley v. United Fire, & Co., Ins. Co.*, L. R. 6 C. P. 155; *Barber v. Fleming*, L. R. 5 Q. B. 59.

⁶ *Forbes v. Aspinall*, 13 *East*, 323; *Devaux v. J'Anson*, 5 *Bing. N. C.* 519.

⁷ *Williamson v. Innes*, 1 *Mood. & Rob.* 88; 8 *Bing.* 81, note.

legally binding,¹ though it need not be written or under seal,² and also that ship and cargo were in such a relation in fact, that nothing but the perils insured against could prevent freight being earned.³

Proof of loss. Direct proof of the fact of loss may be, and in most cases is, given by the parol testimony of the master, officers, or some of the crew of the ship: it may also be proved by other legal evidence. In one case, *Le Blanc, J.*, ruled that the fact of capture might be proved by the production of Lloyd's book, wherein it was mentioned:⁴ the condemnation, however, of a foreign Court of Prize is not evidence to prove a capture in fact, though, after such proof has been given, it is evidence of the grounds of condemnation.⁵

The protest of the captain cannot be put in evidence for the shipowner, but if produced against him by the other side, it thereupon becomes evidence for the ship also.

Proof of confiscation. In one case Lord Ellenborough ruled that, in order to prove a confiscation, it was not necessary to show that the proceeds of the goods seized actually came into the treasury of the State, but that it was enough to show that they were forcibly taken possession of by the officers of government.⁶

Presumptive proof of loss. We have already sufficiently considered what will amount to presumptive proof of loss by foundering, and need not here repeat the points decided on that head:⁷ it may be added, that in such cases it is proper to be provided with evidence of any collateral circumstance that may tend to support the presumption, as, that other vessels which sailed at the same time did actually arrive,⁸ the usual length of the voyage,

¹ *Patrick v. Eames*, 3 Camp. 441.

² *Flint v. Flemyng*, 1 B. & Ad. 48.

³ Reference must be made on the question as to the commencement of the risk on ship, goods, or freight, to the chapter in which that very nice question has been minutely discussed, ante, Pt. I. Ch. IX.

⁴ *Abel v. Potts*, 3 Esp. 242. *Sed quære.*

⁵ *Marshall v. Parker*, 2 Camp. 69.

⁶ *Carruthers v. Graham*, 3 Camp. 142.

⁷ Ante, Pt. III. Ch. II.

⁸ *Newby v. Read*, 1 Park, Ins. 148.

the difficulty of navigation, the prevalence of tempestuous weather, &c.

In case of total loss on ships in open policies (which, however, are not frequent on this interest), the mode of proving the insurable value, and therefore the amount of indemnity claimable by the assured, would be by the testimony of surveyors, who were acquainted with the condition, and can give an estimate of the worth, of the ship before she sailed on her last voyage. In case of average loss, the expense of repairs, deducting one third new for old, would be the measure of damage, and must be proved by the production of the ship-builder's accounts, accompanied with vouchers and other proofs of payment.¹

Amount of
loss on ship.

It is clearly settled that the assured may recover for a partial, although he has declared for a total, loss;² indeed this is matter of common form. He may, as we have already seen, recover for loss by salvage, although it be not specifically alleged as a loss in the Statement of Claim;³ but if it be salvage which he has been obliged to pay to recaptors, he cannot recover the amount unless he produces and proves the proceedings in the Admiralty Court, under seal; for the extent of his claim depends on the judgment of that Court.⁴ Where the assured on ship, who had claimed a total, but was only entitled to an average, loss, merely proved that his ship had sustained some damage, but gave no evidence as to its extent, Lord Tenterden directed the jury to find a verdict for the plaintiff, with nominal damages only.⁵

In cases of double insurance, as we have elsewhere seen,

¹ *Lohre v. Aitchison*, 2 Q. B. D. 501. But in case of sale unrepaired, see the rule of adjustment in *Pitman v. Universal Mar. Ins. Co.*, 9 Q. B. D. 192.

² *Gardner v. Croasdale*, 2 Burr. 904; *King v. Walker*, 2 H. & C. 384; 3 id. 209.

³ *Cary v. King*, Rep. t. Hardw.

304.

⁴ *Thellusson v. Shedden*, 4 B. & P. N. R. 228; and 27 & 28 Vict. c. 25, s. 40.

⁵ *Tanner v. Bennett, Ry. & Mood.* 182. But, as Mr. Phillips remarks, the damage should not be less than the usual exception of losses under 3 per cent. in the policy.

In case of
double
insurance.

the assured may recover against either set of underwriters up to the whole amount insured by them, supposing his interest entitle him ;¹ if, however, after having recovered against one, he afterwards goes on against another set, he can only recover for the excess.²

Policy to pro-
tect other
parties.

He can, however, recover for more than the extent of his own individual interest if, in the opinion of the jury, he intended to insure not only on his own behalf, but also on that of some other party who was also interested in the subject insured at the time of effecting the policy ; in such case, it is of course understood that he recovers the surplus as trustee for the party on whose behalf he so insured.³

Mercantile
interest.

By the Common Law no interest was recoverable on the amount of loss, except in cases where the assured had, before the trial, made application to the underwriter for the amount, and notified to him the ground of his application.⁴ Now, however, by the 3 & 4 Will. 4, c. 42, s. 29, juries may, if they think fit, give damages, in the nature of interest, over and above the money recoverable in all actions on policies of insurance made after the passing of the Act.

Interest on
bottomry
loans.

In regard to interest on bottomry loans, it has been laid down by Story, J., that the sum lent and the bottomry interest are to be considered as an aggregate debt from the time the bond becomes due by the successful termination of the voyage, and that, consequently, from such time common interest is to be allowed on the aggregate amount :⁵ and such, it seems, would now be the law in this country, as it is not to be supposed that the old maxim *accessio accessionis non est*⁶ would in the present day have any weight with our Courts.

¹ *Newby v. Reid*, 1 W. Bl. 416 ;
Rogers v. Davis, 2 Park, Ins. 601.

² *Bruce v. Jones*, 1 H. & C. 769 ;
Bousfield v. Barnes, 4 Camp. 228.

³ *Irving v. Richardson*, 2 B. & Ad.
193. See as to the amount recover-
able for an average loss, *Lohre v.*

Aitchison, 2 Q. B. D. 501.

⁴ *Bain v. Case*, 3 C. & P. 496. See
Kingston v. M'Intosh, 1 Camp. 518 ;
Higgins v. Sargent, 2 B. & Cr. 348.

⁵ *The Ship Packet*, 3 Mason, 255.

⁶ 2 Marshall, Ins. 759.

It will not be necessary, after the full consideration which Causes of loss. has been already given to the mode of stating and proving losses by the perils insured against,¹ to do more in this place than notice a few of the more important points. In the allegation of loss in the example of a statement of claim given above the cause is specifically assigned: and this may now be assumed to be the rule binding on the pleader. Of course, an amendment may be made at any time, even at the trial if the evidence shows this to be necessary. In this lies the amelioration made by the modern from the older practice when the assignment of a specific cause of the loss was required, and when if not proved as assigned it was fatal to the action.

With regard to losses by the perils of the sea, it may be Loss by perils of the sea. observed generally, that all losses proved to be proximately caused by the winds and waves, by drifting against rocks, or stranding, &c., though remotely occasioned by the acts and negligence (not amounting to barratry) of the master and crew, will sustain an allegation of loss by the perils of the sea,² it is otherwise where barratry is the direct producing cause of the loss.³ Where stranding is proved to be the main cause of the total loss claimed in the action, it will support an allegation of loss by the perils of the seas, though the property falls ultimately into the hands of an enemy;⁴ on the other hand, where the damage occasioned by the stranding is partial, and the substantial cause of the total loss claimed is the consequent capture or seizure, this will not support an allegation of loss by perils of the seas, but the loss should be averred to be by the capture.⁵ Damage done by collision, where there is no

¹ Ante, Pt. III. Ch. II.

476.

² *Walker v. Maitland*, 5 B. & Ald. 171; *Stewart v. Bell*, *ibid.* 238; *Phillips v. Headlam*, 2 B. & Ad. 380; *Dixon v. Sadler*, 5 M. & W. 205; *Redman v. Wilson*, 14 M. & W.

³ *Everth v. Hannam*, 6 Taunt. 375.

⁴ *Hahn v. Corbett*, 2 Bing. 205.

⁵ *Green v. Elmslie, Peake*, N. P. 212; *Livie v. Jansen*, 12 East, 648.

fault on either side, is a loss by perils of the sea;¹ so it is where the fault rests entirely with the other vessel;² but a sum paid under a rule of the sea as a moiety of the damage done by collision, is not in this country a loss by perils of the seas, since it is not proximately caused by those perils.³ On the same ground, loss by sale of goods, for repairs of the ship, has been held not to be a loss by the perils of the sea.⁴ Damage caused by taking the ground in a tidal harbour, owing to a heavy swell, has been held a loss by perils of the sea.⁵

Death of cattle by rolling of the ship at sea,⁶ or partly by that cause and partly by their own violent kicking and plunging,⁷ is a loss by perils of the sea; if, however, their death were caused by scarcity of provisions owing to the prolongation of the voyage, either by the mistake of the captain,⁸ or in consequence of bad and stormy weather, it seems this would be a loss by mortality, within the exception of that cause, and not by perils of the sea.⁹

Damage caused to the hull of the ship by worms,¹⁰ or rats,¹¹ is not a loss by perils of the sea, but by wear and tear. Leakage caused by the violent pitching of the ship in a storm is a loss by perils of the sea, though the stowage be not damaged.¹² So is damage caused to cargo by shipping seas, after being wrongfully seized and taken in tow by a British man-of-war, though the loss in this case may also be alleged to be by seizure.¹³

¹ Buller v. Fisher, 3 Esp. 67.

² Smith v. Scott, 4 Taunt. 126.

³ De Vaux v. Salvador, 4 A. & E. 420. *Aliter*, in United States, Peters v. Warren Ins. Co., 3 Sumner, 389.

⁴ Powell v. Gudgeon, 5 M. & Sel. 431; Sarquy v. Hobson, 2 B. & Cr. 7; 4 Bing. 131.

⁵ Fletcher v. Inglis, 2 B. & Ald. 315.

⁶ Lawrence v. Aberdeen, 5 B. & Ald. 107.

⁷ Gabay v. Lloyd, 3 B. & Cr. 793.

⁸ Gregson v. Gilbert, 3 Dougl. 232.

⁹ Tatham v. Hodgson, 6 T. Rep. 656, as explained and commented on by Lord Tenterden, 5 B. & Ald. 111.

¹⁰ Rohl v. Parr, 1 Esp. 444.

¹¹ Hunter v. Potts, 4 Camp. 203.

¹² Crofts v. Marshall, 7 C. & P. 597.

¹³ Hagedorn v. Whitmore, 1 Stark. 157.

Loss of ship, reduced to a state of innavigability by sea-damage, and justifiably sold by the master abroad, is a loss by perils of the sea.¹

An allegation of loss by fire is sustained by proof that the ship was burnt by her captain, in order to avoid being captured;² or that she was accidentally burnt by the negligence of her crew;³ but not as to goods, where the fire is shown to have originated in the spontaneous combustion of the goods themselves put on board in an improper condition.⁴

Proof of capture by collusion will sustain an allegation of a loss by capture, though it would also support a count for loss by barratry;⁵ proof of wrongful detention by a British man-of-war would be evidence of a loss by seizure, though the sea damage sustained during the detention is recoverable as loss by perils of the sea;⁶ proof that ship's cargo was taken out by enemies, and ship then suffered to sail with another, will support an allegation of loss by detention of princes;⁷ but an averment of seizure in a hostile manner by enemies unknown is not sustained by evidence of seizure by order of a foreign government, *e.g.*, of goods about to be illegally imported.⁸

Under an allegation of loss by barratry, it is not necessary for the assured, in the first instance, to give negative proof that the person acting as master was not the owner, or at least not the sole owner; it lies on the underwriter to prove affirmatively that he was:⁹ but, in order to support a count for loss by barratry, it must be proved that the master acted, if not fraudulently, at least against his better judgment.¹⁰

¹ *Parfitt v. Thomson*, 13 M. & W. 392; *Farnworth v. Hyde*, 34 L. J. (C. P.) 207.

² *Gordon v. Rimmington*, 1 Camp. 123.

³ *Busk v. Royal Exch. Ass. Co.*, 2 B. & Ald. 73.

⁴ *Boyd v. Dubois*, 3 Camp. 133.

⁵ *Arcangelo v. Thompson*, 2 Camp.

621.

⁶ *Hagedorn v. Whitmore*, 1 Stark. 159; *Lozano v. Janson*, 2 E. & E. 100; 28 L. J. (Q. B.) 337.

⁷ *Abel v. Potts*, 3 Esp. 242.

⁸ *Matthie v. Potts*, 3 B. & P. 23.

⁹ *Ross v. Hunter*, 4 T. R. 33.

¹⁰ *Todd v. Ritchie*, 2 Stark. 240; *Bottomley v. Bovill*, 5 B. & Cr. 210.

Other perils
and misfor-
tunes.

Damage caused by the ship's being blown over in a graving dock,¹ or by her bilging, owing to the giving way of tackle on being got out of dock,² or owing to the tide washing away her props, while hove down on a beach for repairs,³ have been held not to be losses by perils of the sea. Such losses usually fall within the terms "all other losses, perils, and misfortunes" as being *ejusdem generis* with the specific perils mentioned in the policy. So, a loss by the bursting of a boiler on board a steamer at sea, although the state of the boiler is bad through negligence, but the boiler itself will not be included in the damage recoverable.⁴ In like manner the loss caused by the bursting of the air-tank of a donkey engine through the negligent closing of the through passage for the water.⁵ And damage caused by one ship firing into another under the mistaken notion that she is an enemy;⁶ or by throwing overboard goods, to prevent them falling into the hands of the enemy.⁷

Evidence in
defence.
Unseaworthi-
ness.

The defence of unseaworthiness is one of those that must be specially pleaded. A question can hardly arise as to the party on whom the burden of proof lies, on the issue raised by a denial of this plea, as the fact of seaworthiness is an implied condition precedent to the attaching of the policy. It has been held, indeed, that the assured should give some proof of the affirmative in the first instance.⁸ But that opinion seems not to accord with the nature of the

¹ Phillips v. Barber, 5 B. & Ald. 607.
² Devaux v. J'Anson, 5 Bing. 161.

³ Thompson v. Whitmore, 3 Taunt. 227; Rowcroft v. Dunsmore, *ibid.*
⁴ West India Telegraph Co. v. Home & Colonial Ins. Co., 6 Q. B. D. 51.

⁵ Hamilton v. Thames and Mersey Mar. Ins. Co., 17 Q. B. D. 195.

⁶ Cullen v. Butler, 5 M. & Sel. 461. See Hyde v. Powell, 5 E. & B.

607.
⁷ Butler v. Wildman, 3 B. & Ald. 398.

⁸ Per Story, J., in Tidmarsh v. Washington Fire and Mar. Ins. Co., 4 Mason, 441. But the Supreme Court of Massachusetts held, that the ship is to be presumed seaworthy till the contrary appears, and that the burden of proving unseaworthiness is on the underwriters. Paddock v. Franklin Ins. Co., 11 Pick. 227; see 2 Phillips, Ins., no. 2152.

pleadings, or with the principles of the contract of insurance ; and consequently in this country the burthen is cast upon the underwriter of proving unseaworthiness.

If the underwriters can show that the ship, shortly after sailing, without any visible or adequate cause, became leaky or otherwise incapable of performing the voyage insured, this will be presumptive proof that she was unseaworthy at the commencement of the risk ;¹ though if two special juries have concurred in finding a verdict in opposition to this presumption, the Court is not likely to grant a third trial.²

Upon a question of seaworthiness experienced shipwrights may be called to give an opinion, whether, upon the facts proved, the ship could have been seaworthy at the commencement of the risk.³

Proof of misrepresentation will generally comprise the following facts :—1. That the representation was made ; 2, That it was material ; 3. That it was either false at the time, or falsified by subsequent events. In order to prove the first point, recourse may be had to the party by whom the representation was made, or to others who heard it ; its materiality is a question for the jury, and will generally be made out by the nature of the statement itself ; the proof of the third point will depend upon, and be readily suggested by, the facts of the case.

Burden of proof under plea of misrepresentation.

Illegality is never presumed, but must always be proved in the first instance by the party who relies on it as a defence. Thus, whenever the defence turned on non-compliance with the convoy acts, Lord Ellenborough held that the burden of proof lay on the underwriters to make out, in the first instance, how the acts had been violated.⁴ So, where

Proof of illegality is on defendant.

¹ *Watson v. Clark*, 1 Dow. 344 ; 116 ; *Thornton v. Royal Exch. Ass. Co.*, Peake, 25.
Munro v. Vandam, 1 Park, Ins. 469 ; *Parker v. Potts*, 3 Dow. 23.

² *Foster v. Steele*, 3 Bing. N. C. 892.
⁴ *Thornton v. Lance*, 4 Camp. 231 ; *D'Aguilar v. Tobin*, Holt, 185 ; 2 Marsh. R. 265.

³ *Beckwith v. Sydebotham*, 1 Camp.

an insurance was made to a port or ports within a certain territory, where some of the ports were neutral and others hostile, it was held that the presumption was that the ship was destined to one of the neutral ports.¹

Constructive
total loss.

It is upon the assured to show, in a case of alleged constructive total loss, that the circumstances attending the insured property were such as justified the notice of abandonment, and so continued down to the time of action brought. It is upon the defendant (the underwriter) to reduce the plaintiff's claim to an average loss. In a case of wrongful taking at sea and condemnation as a slaver, by the Vice-Admiralty Court of St. Helena, Lord Campbell says:—"As from the wrongful seizure and notice of abandonment, the loss was at one time to be regarded as total; the *onus* seems to be cast upon the underwriter of showing that by subsequent events it ceased to be so. And if before action brought the goods had been restored to the assured, or he had the means of getting possession of them, under such circumstances as ought to have induced a prudent man to take possession of them, his claim could now only have been for a partial loss. But the mere existence of the ship or goods insured, after a total loss and abandonment, so that possession of them may, possibly, be resumed by the owner, will not reduce it to a partial loss. The true rule seems to us to be laid down by Bayley, J., in *Holdsworth v. Wise*,² that the subject of the insurance must be in existence 'under such circumstances that the assured may, if they please, have possession, and may reasonably be expected to take possession of it.'"³

¹ Anon., 1 Chit. R. 49. See Hobbs 798.

v. Henning, 34 L. J. (C. P.) 117.

² *Lozano v. Janson*, 28 L. J.

³ *Holdsworth v. Wise*, 7 B. & Cr. (Q. B.) 337, 342; 2 E. & E. 100.

APPENDIX OF STATUTES.

19 GEO. 2, c. 37.

An Act to regulate Insurance on Ships belonging to the Subjects of Great Britain, and on Merchandizes or Effects laden thereon.

WHEREAS it hath been found by experience, that the making assurances, interest or no interest, or without further proof of interest than the policy, hath been productive of many pernicious practices, whereby great numbers of ships, with their cargoes, have either been fraudulently lost and destroyed, or taken by the enemy, in time of war; and such assurances have encouraged the exportation of wool, and the carrying on many other prohibited and clandestine trades, which by means of such assurances have been concealed, and the parties concerned secured from loss, as well to the diminution of the publick revenue, as to the great detriment of fair traders; and by introducing a mischievous kind of gaming or wagering, under the pretence of assuring the risque on shipping, and fair trade, the institution and laudable design of making assurances, hath been perverted; and that which was intended for the encouragement of trade and navigation, has, in many instances, become hurtful of, and destructive to the same: for remedy whereof be it enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the first day of August, one thousand seven hundred and forty-six, no assurance or assurances shall be made by any person or persons, bodies corporate or politick, on any ship or ships belonging to his Majesty or any of his subjects, or on any goods, merchandizes or effects laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer; and that every such assurance shall be null and void to all intents and purposes.

Preamble.

No assurance to be made on ships or effects, &c.

Provided always, and be it further enacted by the authority aforesaid, That assurance on private ships of war, fitted out by any of his Majesty's subjects solely to cruise against His Majesty's enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the assurer; anything herein contained to the contrary thereof in anywise notwithstanding.

Assurance on private ships of war may be made for the owners.

Provided also, and it is hereby enacted, That any merchandizes or effects from any ports or places in Europe or America, in the possession of the crowns of Spain or Portugal, may be assured in such way and manner, as if this Act had not been made.

Assurance on effects from Spain or Portugal.

[This section was repealed by 27 & 28 Vict. c. 56, § 1, which expressly legalises re-insurances. The repealing enactment being itself repealed by 30 Vict. c. 23, schedule D., and also by 30 & 31 Vict. c. 59, re-insurances are thereby left as at Common Law, and therefore legal.]

Prohibition of re-insurances except in cases of insolvency, bankruptcy, or death.

In all actions plaintiff to declare within fifteen days what sums he hath assured.

[Repealed as to the Supreme Court of Judicature by 42 & 43 Vict. c. 59.]

Persons sued on policies of assurance,

to bring the money into Court;
plaintiff not accepting it,
and jury not assessing greater damages,
to pay costs.

And be it further enacted by the authority aforesaid, that in all actions or suits brought or commenced after the said first day of August, by the assured, upon any policy of assurance, the plaintiff in such action or suit, or his attorney or agent, shall, within fifteen days after he or they shall be required so to do in writing, by the defendant, or his attorney or agent, declare in writing what sum or sums he hath assured, or caused to be assured in the whole, and what sums he hath borrowed at respondentia or bottomree, for the voyage, or any part of the voyage in question, in such suit or action.

And whereas it is unreasonable that any person or persons, body or bodies corporate, subscribing, sealing, or otherwise executing any policy or policies of assurance, should be put to any costs, charges, or expenses, in any suit or action at law, to be brought on such policy or policies, in case such person or persons, body or bodies corporate, is or are ready and willing to pay such damages and costs, as shall and may be really and *bond fide* due thereon, which at present they are liable to, and often forced unjustly to bear, for that in many cases, upon such policies, no money can be brought into Court: for remedy whereof, be it enacted by the authority aforesaid, that from and after the said first day of August, it shall and may be lawful for any person or persons, body or bodies corporate, sued in any action or actions of debt, covenant, or any other action or actions, on any policy or policies of assurance, to bring into Court any sum or sums of money; and if any such plaintiff or plaintiffs shall refuse to accept such sum or sums of money, so brought into Court as aforesaid, with costs to be taxed, in full discharge of such action or actions, and shall afterwards proceed to trial in such action or actions, and the jury shall not assess damages to such plaintiff or plaintiffs, exceeding the sum or sums of money so brought into Court, such plaintiff or plaintiffs, in every such case and cases, shall pay to such defendant or defendants, in every such action and actions, costs to be taxed; any law, custom, or usage to the contrary notwithstanding.

28 GEO. 3, c. 56.

An Act to repeal an Act, made in the Twenty-fifth Year of the Reign of his present Majesty, intituled, "An Act for regulating Insurances on Ships, and on Goods, Merchandizes, or Effects:" and for substituting other Provisions for the like purpose, in lieu thereof.

Preamble.

25 Geo. III.
c. 44, recited.

Recited act repealed; and from passing the present Act, no policy to be made on any ship, &c., without inserting thereon the

WHEREAS it hath been found, by experience, that great mischiefs and inconveniencies have arisen to persons interested in ships or vessels, and also to persons using trade or commerce, from the effect of an Act made in the twenty-fifth year of the reign of his present Majesty, intituled, "An Act for regulating Insurances on Ships, and on Goods, Merchandizes, or Effects:" And whereas it is highly expedient that other and more convenient provisions should be made for the regulating insurances hereafter to be made on ships, and on goods, merchandizes, or effects, than those which are contained and enacted in and by the said Act; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the said Act, made in the twenty-fifth year of the reign of his present Majesty, shall be, and the same is hereby repealed; and that, from and after the passing of this Act, it shall not be lawful for any person or persons to make or effect, or cause to be made or effected, any policy or policies of assurance upon any ship or ships, vessel or vessels, or upon any goods, merchandizes, effects, or other property whatsoever, without first

inserting, or causing to be inserted, in such policy or policies of assurance, the name or names, or the usual stile and firm of dealing of one or more of the persons interested in such assurance; or without, instead thereof, first inserting, or causing to be inserted in such policy or policies of assurance, the name or names or the usual stile and firm of dealing of the consignor or consignors, consignee or consignees of the goods, merchandizes, effects, or property so to be insured; or the name or names, or the usual stile and firm of dealing of the person or persons residing in Great Britain, who shall receive the order for and effect such policy or policies of assurance, or of the person or persons who shall give the order or direction to the agent or agents immediately employed to negotiate or effect such policy or policies of assurance.

name or names, or the firm of dealing of one or more of the persons interested, &c.

2. And be it further enacted by the authority aforesaid, that every policy and policies of assurance, made or underwrote contrary to the true intent and meaning of this Act, shall be null and void to all intents and purposes whatsoever.

Policies made contrary to this Act to be void.

30 VICT. c. 23.

An Act to grant and alter certain Duties of Customs and Inland Revenue, and for other purposes relating thereto.

[31st May, 1867.]

Most Gracious Sovereign,

WE, your Majesty's most dutiful and loyal subjects, the commons of the United Kingdom of Great Britain and Ireland, in Parliament assembled, towards raising the necessary supplies to defray your Majesty's public expenses, and making an addition to the public revenue, have freely and voluntarily resolved to give and grant unto your Majesty the several duties hereinafter mentioned; and do therefore most humbly beseech your Majesty that it may be enacted; and be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in the present parliament assembled, and by the authority of the same, as follows:

1. There shall be charged, collected, and paid, for the use of her Majesty, her heirs and successors, the several duties of customs and inland revenue respectively specified in the schedules marked respectively (A), (B), and (C) to this Act; and the said duties shall respectively take effect at the dates, and shall continue to be charged, collected, and paid during the periods respectively specified in that behalf in the said schedules respectively, and where no date is specified for the commencement of any duty the same shall commence and take effect from the passing of this Act, and where no period is specified for the duration of any duty the same shall continue to be charged, collected, and paid until Parliament shall otherwise order; and the said schedules shall be deemed to be part of this Act.

Grant of duties specified in schedules annexed.

2. All the powers, provisions, allowances, exemptions, forfeitures, and penalties contained in or imposed by any Act or Acts, or any schedule thereto, relating to customs duties and stamp duties, and in force at the time of the passing of this Act, and relating to the duty of income tax, and in force on the fifth day of April one thousand eight hundred and sixty-seven, shall respectively be in full force as to the said duties granted by this Act, so far as the same are applicable, and shall be observed, applied, allowed, enforced, and put in execution for and in the raising, levying, collecting, and securing of the said duties, and otherwise in relation thereto, so far as the same shall not be repealed or superseded by and shall be consistent with the provisions of this Act, as fully and effectually, to all intents and purposes, as if the same had been herein expressly enacted with reference to the said duties respectively.

Provisions of former Acts to apply to duties under this Act.

AS TO STAMP DUTY ON SEA INSURANCES.

Repeal of Acts
in schedule (D).

3. On the passing of this Act the stamp duties now payable for policies of sea insurance shall cease and determine, and the several Acts and parts of Acts specified in the schedule marked (D) to this Act annexed are hereby repealed, save so far as respects any policy made prior to the passing of this Act, and as respects any forfeiture or penalty incurred in respect of any offence against any enactment so repealed.

Interpretation
of terms.

4. In this Act the expression "*sea insurance*" means any insurance (including re-insurance) made upon any ship or vessel, or upon the machinery, tackle, or furniture of any ship or vessel, or upon any goods, merchandise, or property, of any description whatever, on board of any ship or vessel, or upon the freight of or any other interest which may be lawfully insured in or relating to any ship or vessel; and the word "*policy*" means any instrument whereby a contract or agreement for any sea insurance is made or entered into.

[The term *sea insurance* is, by 47 & 48 Vict. c. 62, § 8, extended to cover land carriage when part of the transit, and also delay in warehouse when auxiliary to the transit.]

5. Commissioners to provide stamped forms of policies. [Repealed by 44 & 45 Vict. c. 12, Sched.]

6. Office in London for distributing stamped forms of policies. [Repealed by 44 & 45 Vict. c. 12, Sched.]

Contract for
insurance to be
in writing, and
to specify cer-
tain particulars.

7. No contract or agreement for sea insurance (other than such insurance as is referred to in the fifty-fifth section of "The Merchant Shipping Act Amendment Act, 1862,") shall be valid unless the same is expressed in a policy; and every policy shall specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured; and in case any of the above-mentioned particulars shall be omitted in any policy, such policy shall be null and void to all intents and purposes.

No policy to be
made for more
than twelve
months.

8. No policy shall be made for any time exceeding twelve months, and every policy which shall be made for any time exceeding twelve months shall be null and void to all intents and purposes.

No policy valid
unless duly
stamped.

9. No policy shall be pleaded or given in evidence in any court, or admitted in any court to be good or available in law or in equity, unless duly stamped; and it shall not be lawful for the said Commissioners or any officer of Inland Revenue to stamp any policy at any time after it is signed or underwritten by any person, on any pretence whatever, except in the two cases following; that is to say,

Exception in
case of certain
mutual in-
surances;

1st. Any policy of mutual insurance having a stamp or stamps impressed thereon may, if required, be stamped with an additional stamp or stamps, provided that at the time such additional stamp or stamps shall be required the policy shall not have been signed or underwritten to an amount exceeding the sum or sums which the stamp or stamps previously impressed thereon will warrant:

and in case of
policies made
abroad.

2nd. Any policy made abroad and chargeable with duty by virtue of the 28 & 29 Vict. c. 96, § 15, may be stamped within the time specified in that Act.

[By the combined effect of 33 & 34 Vict. c. 97, § 117, and 44 & 45 Vict. c. 12, § 44, the *time specified* is within fourteen days after it has been first received in the United Kingdom.]

Legal altera-
tions in policies
may be made
under certain
restrictions.

10. Nothing in this Act shall extend or be construed to extend to prohibit the making of any alteration which may lawfully be made in the terms and conditions of any policy after the same shall have been underwritten; provided that such alteration be made before notice of the determination of the risk originally insured, and that it shall not prolong the time covered by the insurance thereby made beyond the period of six months in the case of a

policy made for a less period than six months, or beyond the period allowed by this Act in the case of a policy made for a greater period than six months, and that the articles insured shall remain the property of the same person or persons, and that no additional or further sum shall be insured by reason or means of such alteration.

11. Where any sea insurance is made for a voyage and also for time, or to extend to or cover any time beyond *twenty-four hours* after the ship shall have arrived at her destination and been there moored at anchor, the policy shall be chargeable with duty as a policy for a voyage, and also with duty as a policy for time.

Policies for voyage and time chargeable with two duties.

[By the 47 & 48 Vict. c. 62, § 8, "thirty days" is substituted for "twenty-four hours."]

12. Where any carrier by sea or other person shall, in consideration of any sum of money paid or to be paid for additional freight or otherwise, agree to take upon himself any risk attending goods, merchandise, or property of any description whatever while on board any ship or vessel, or engage to indemnify the owner of any such goods, merchandise, or property from any risk, loss, or damage, such agreement or engagement shall be deemed to be a contract for a sea insurance.

As to insurances by carriers.

13. If any person shall become an assurer upon any sea insurance, or shall subscribe or underwrite, or otherwise sign or make, or enter into any contract, agreement, or memorandum, for or of any sea insurance, or shall receive or contract for any premium or consideration for any sea insurance, or shall receive or charge, or take credit in account for any such premium or consideration as aforesaid, or any sum of money as or for any such premium or consideration as aforesaid, or shall wilfully or knowingly take upon himself any risk, or render himself liable to pay, or shall pay or allow, or agree to pay or allow, in account or otherwise, any sum of money upon any loss, peril, or contingency relative to any sea insurance, unless such insurance shall be written on vellum, parchment, or paper duly stamped, or if any person shall be concerned in any fraudulent contrivance or device, or shall be guilty of any wilful act, neglect, or omission, with intent to evade the duties payable on policies under this Act, or whereby the duties may be evaded, every person so offending shall for every such offence forfeit the sum of one hundred pounds.

Penalty on assuring unless policy duly stamped.

14. Every person who shall make or effect, or knowingly procure to be made or effected, any sea insurance, or shall give or pay, or render himself liable to pay, any sum of money, premium, or consideration whatever in the nature of a premium for or upon any sea insurance, or shall enter into any contract or agreement whatever for any sea insurance, unless the same insurance contract and agreement for insurance, respectively, shall be written on vellum, parchment or paper, being first duly stamped, shall for every such offence forfeit and pay the sum of one hundred pounds; and every broker, agent, or other person negotiating or transacting any sea insurance contrary to the true intent and meaning of this Act, or writing any agreement for any sea insurance upon vellum, parchment, or paper not duly stamped, shall for every such offence forfeit the sum of one hundred pounds.

Penalty on persons effecting insurance unless duly stamped.

15. If any person shall make or issue, or cause to be made or issued, any document purporting to be a copy of a policy, and there shall not be in existence, at the time of such making or issue, a policy duly stamped whereof the said document shall be a copy, he shall for such offence forfeit the sum of one hundred pounds in addition to any other penalty which he may have incurred under this Act.

Penalty for issuing a copy of policy where no policy.

16. It shall not be lawful for any broker, agent, or other person negotiating or transacting or making any sea insurance to charge his employer any sum of money for brokerage or agency, or for his pains or labour in negotiating, transacting, or making such insurance, or writing the same, or for any monies expended or paid by way of premium or consideration in the nature of a premium for such insurance, unless the same shall be written on vellum, parchment, or paper, duly stamped; and all and every sum and sums whatever paid by such employer on any such account to any broker, agent,

Brokerage not to be a legal charge unless policy duly stamped.

or other person negotiating or transacting or making any insurance contrary to this Act shall be deemed to be paid without consideration, and shall remain the property of such employer, his executors, administrators, or assigns.

Allowance may be made in the case specified.

17. Where a policy shall be inadvertently filled up in an incorrect or improper manner, or be obliterated or otherwise spoiled and rendered unfit for use, or shall be filled up for some insurance which shall not be proceeded in, and the same shall not be signed by any underwriter, but in no other case, it shall be lawful for the said Commissioners to allow as spoiled, and to cancel, the stamps on such policy, provided that application shall be made for the allowance within six months after such policy shall be spoiled or become useless; and the enactments now in force with reference to the allowance of spoiled stamps shall, so far as the same are applicable, extend to the allowance hereinbefore mentioned.

Officers of Inland Revenue may be authorized to examine claims for allowances.

18. The said Commissioners may authorize any officer or officers of Inland Revenue to receive and examine the claims made for such allowance as aforesaid, and to take affidavits and affirmations relating thereto, and to administer the proper oaths and affirmations for that purpose, and to do all or any act or acts respecting such claims which the Commissioners themselves are authorized to do.

AS TO INCOME TAX.

Sections 6 & 7 of 29 Vict. c. 36, not to apply, &c.

19. Nothing herein contained shall continue or be construed to continue the provisions contained in the sixth and seventh sections of the Act passed in the twenty-ninth year of Her Majesty's reign, chapter thirty-six; and for the purposes of this Act the year one thousand eight hundred and sixty-two mentioned in the forty-third section of the Act passed in the twenty-fifth year of Her Majesty's reign, chapter twenty-two, shall be read as and deemed to mean the year one thousand eight hundred and sixty-seven.

SCHEDULES.

SCHEDULE (A).

CONTAINING the DUTIES of CUSTOMS granted by this Act.

The duties of customs now charged on tea shall continue to be levied and charged—

On and after the first day of August one thousand eight hundred and sixty-seven until the first day of August one thousand eight hundred and sixty-eight, on the importation thereof into Great Britain and Ireland; that is to say,

	£	s.	d.
Tea the lb.	0	0	6

SCHEDULE (B).

CONTAINING the STAMP DUTIES granted by this Act.

	<i>s.</i>	<i>d.</i>
For every policy of sea insurance for or upon any voyage—		
In respect of every full sum of one hundred pounds and in respect of any fractional part of one hundred pounds thereby insured	0	3
For every policy of sea insurance for time—		
In respect of every full sum of one hundred pounds and in respect of any fractional part of one hundred pounds thereby insured—		
Where the insurance shall be made for any time not exceeding six months	0	3
Where the insurance shall be made for any time exceeding six months and not exceeding twelve months	0	6
[But if the separate and distinct interests of two or more persons shall be insured by one policy for a voyage or for time, then the duty of threepence or the duty of threepence or sixpence, as the case may require, shall be charged thereon, in respect of every full sum of one hundred pounds and every fractional part of one hundred pounds thereby insured upon any separate or distinct interest.]		

Repealed by
47 & 48 Vict.
c. 62, § 8.

SCHEDULE (C).

CONTAINING the DUTIES of INCOME TAX granted by this Act.

For one year commencing on the sixth day of April one thousand eight hundred and sixty-seven, for and in respect of all property, profits and gains mentioned or described as chargeable in the Act passed in the sixteenth and seventeenth years of her Majesty's reign, chapter thirty-four, for granting to her Majesty duties on profits arising from property, professions, trades and offices, the following duties shall be charged; (that is to say,)

For every twenty shillings of the annual value or amount of all such property, profits, and gains (except those chargeable under Schedule (B) of the said Act), the duty of fourpence:

And for and in respect of the occupation of lands, tenements, hereditaments, and heritages chargeable under Schedule (B) of the said Act, for every twenty shillings of the annual value thereof—

In England the duty of twopence:

And in Scotland and Ireland respectively the duty of one penny half-penny:

Subject to the provisions contained in section three of the Act twenty-sixth Victoria, chapter twenty-two, for the exemption of persons whose whole income from every source is under one hundred pounds a year, and relief of those whose income is under two hundred pounds a year.

SCHEDULE (D).

CONTAINING the ENACTMENTS repealed by this Act.

Session and Chapter.	Title or Abbreviated Title.	Extent of Repeal.
11 Geo. 1, c. 30	An Act for more effectual preventing frauds and abuses in the publick Revenues, &c. &c.	Section 44.
19 Geo. 2, c. 37	An Act to regulate insurance on ships belonging to the subjects of Great Britain, and on merchandise or effects laden thereon.	Section 4.
35 Geo. 3, c. 63	An Act for granting to his Majesty certain stamp duties on sea insurances.	The whole Act.
39 & 40 Geo. 3, c. 72.	An Act to amend several laws relating to the duties on stamped vellum, parchment, and paper.	Sections 8, 9, 10, 11 and 12.
54 Geo. 3, c. 133	An Act for enabling the Commissioners of Stamps to make allowances for spoiled stamps on policies of insurance in Great Britain, and for preventing frauds relating thereto.	The whole Act.
54 Geo. 3, c. 144	An Act for better securing the stamp duties on sea insurances made in London, &c. &c.	The whole Act, except sections 13 and 14.
9 Geo. 4, c. 49	An Act to amend the laws in force relating to the stamp duties on sea insurance, &c. &c.	Section 1.
5 & 6 Vict. c. 82	An Act to assimilate the stamp duties in Great Britain and Ireland, and to make regulations for collecting and managing the same until the 10th day of October, 1845.	Sections 22, 23, 24, 25, 26, 27, 28, 29 and 30.
7 Vict. c. 21 ..	An Act to reduce the stamp duties on policies of sea insurance, &c. &c.	Section 4 and the schedule.
27 & 28 Vict. c. 56.	An Act for granting to her Majesty certain stamp duties, and to amend the laws relating to the Inland Revenue.	Section 1.
28 & 29 Vict. c. 96.	An Act to amend the laws relating to the Inland Revenue.	Sections 8 and 9.

SCHEDULE (E).

Form of Policy.

[Repealed by 44 & 45 Vict. c. 12, Sched.]

31 & 32 VICT. c. 86.

An Act to enable Assignees of Marine Policies to sue thereon in their own Names.

[31st July, 1868.]

WHEREAS it is expedient that the assignees of marine policies of insurance should be enabled to sue thereon in their own names:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Whenever a policy of insurance on any ship, or on any goods in any ship, or on any freight, has been assigned, so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name; and the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected.

Assignees of marine policies may sue thereon in their own names.

2. It shall be lawful to make any assignment of a policy of insurance by endorsement on the policy in the words or to the effect set forth in the schedule hereto.

Assignment by endorsement.

3. For the purposes and in the construction of this Act, the term "policy of insurance" or "policy" shall mean any instrument by which the payment of money is assured or secured on the happening of any of the contingencies named or contemplated in the instrument of assurance known as "*Lloyd's Policy*," or in any other form adopted for insuring ships, freights, and goods carried by sea.

Interpretation of terms.

4. This Act may be cited for all purposes as the "*Policies of Marine Assurance Act, 1868.*"

Short title.

SCHEDULE.

FORM OF ASSIGNMENT.

I *A.B.* of, &c., do hereby assign unto *C.D.*, &c., his executors, administrators, and assigns, the within policy of assurance on the ship, freight, and the goods therein carried [*or on ship or freight or goods, as the case may be*].

In witness whereof, &c.

33 & 34 VICT. c. 97. (*General Stamp Act, 1870.*)

16. (1.) Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, the officer whose duty it is to read the instrument shall call the atten-

Terms upon which unstamped or insufficiently

stamped instrument may be received in evidence in any court.

tion of the judge to any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the amount of the unpaid duty, and the penalty payable by law on stamping the same as aforesaid, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds.

[See as to a *policy* and the *penalty payable* 39 Vict. c. 6, below.]

The officer of the court to account for duties and penalties.

(2.) The officer receiving the said duty and penalty shall give a receipt for the same, and make an entry in a book kept for that purpose of the payment and of the amount thereof, and shall communicate to the Commissioners the name or title of the cause or proceeding in which, and of the party from whom, he received the said duty and penalty, and the date and description of the instrument, and shall pay over to the Receiver General of Inland Revenue, or to such other person as the Commissioners may appoint, the money received by him for the said duty and penalty.

(3.) Upon production to the Commissioners of any instrument in respect of which any duty or penalty has been paid as aforesaid, together with the receipt of the said officer, the payment of such duty and penalty shall be denoted on such instrument accordingly.

[By 44 & 45 Vict. c. 12, s. 44, the words *judge* and *officer* include any arbitrator or referee.]

Instrument not duly stamped inadmissible.

17. Save and except as aforesaid, no instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall, except in criminal proceedings, be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed.

As to Policies of Insurance.

Interpretation of terms, &c.

117. (1.) The term "insurance" includes assurance, and the term "policy" includes every writing whereby any contract of insurance is made, or agreed to be made, or is evidenced; and, except as hereinafter mentioned, this Act does not apply to policies of sea insurance.

(2.) A policy of sea insurance made or executed out of, but being in any manner enforceable within, the United Kingdom, is to be charged with duty under the Act of the thirtieth year of her Majesty's reign, chapter twenty-three, and may be stamped at any time within *two months* after it has been first received in the United Kingdom on payment of the duty only.

[By 44 Vict. c. 12, *fourteen days* instead of *two months*.]

33 & 34 VICT. c. 99.

This statute repeals certain enactments respecting the Inland Revenue, and among these, the 28 & 29 Vict. c. 96, s. 15, relating to the stamps required to be put on policies made out of the United Kingdom. See now 33 & 34 Vict. c. 97, s. 117, *supra*.

39 VICT. c. 6.

An Act to amend the Law relating to the Stamping of Policies of Sea Insurance. [7th April, 1876.]

WHEREAS it is expedient to amend the law relating to the stamping of policies of sea insurance, as contained in an Act of the thirtieth and thirty-first years of her Majesty's reign, chapter twenty-three, and "The Stamp Act, 1870:"

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in

this present Parliament assembled, and by the authority of the same, as follows:—

2. From and after the passing of this Act, section sixteen of "The Stamp Act, 1870," shall apply to a policy of sea insurance. Such policy shall, for the purposes of the said section, be an instrument which may legally be stamped after the execution thereof, and the penalty payable by law on stamping the same as aforesaid, shall be the sum of one hundred pounds.

3. This Act may be cited as the Sea Insurances (Stamping of Policies) Amendment Act, 1876.

44 VICT. c. 12.

44. On and after the first day of June one thousand eight hundred and eighty-one, the Stamp Act, 1870, shall be amended as follows:—

Amendments of
33 & 34 Vict.
c. 97.

- (a) Section sixteen in relation to the production of instruments in evidence shall apply to such production in all proceedings before an arbitrator or referee, and for the purposes of such application the arbitrator or referee shall be "the officer" as well as "the judge" in the said section mentioned;
- (b) Sub-section (2) of section one hundred and seventeen in relation to the time within which a policy of sea insurance made or executed out of the United Kingdom may be stamped, shall be read as if the words "fourteen days" were substituted therein for the words "two months."

SCHEDULE.

30 & 31 Vict. c. 23.—*Repealed*.—Sections 5 and 6, and Schedule E.

47 & 48 VICT. c. 62.

8. On and after the first day of August one thousand eight hundred and eighty-four, the Act of the thirtieth and thirty-first years of the reign of Her present Majesty, chapter twenty-three, shall be amended as follows:—

Amendment of
30 & 31 Vict.
c. 23.

- (1) In section four the term "sea insurance" shall include any insurance of goods, wares, or merchandise, or property of any description whatever, for any transit which includes not only a sea risk, but also any land risk from the commencement of such transit to the place of shipment, or from the place of discharge of the ship to the ultimate destination covered by the insurance, or in warehouse while waiting or being forwarded for shipment, or after discharge and while waiting to be forwarded or being forwarded to the ultimate destination covered by the insurance, or any other land risk incidental to the transit insured.
 - (2) Section eleven shall be read as if the words "thirty days" were substituted therein for the words "twenty-four hours."
 - (3) The provision as to separate and distinct interests in Schedule B. is hereby repealed.
-

XXXIV. VICT. C. XXI.

An Act for incorporating the members of the Establishment or Society formerly held at Lloyd's Coffee House in the Royal Exchange in the city of London, for the effecting of Marine Insurance, and generally known as Lloyd's; and for other purposes. [25th May, 1871.]

Fundamental
rules in
schedule.

19. The rules set forth in the schedule to this Act shall be the fundamental rules of the society.

THE SCHEDULE.

THE FUNDAMENTAL RULES OF THE SOCIETY.

1. There shall be underwriting members and non-underwriting members.
2. A non-underwriting member shall not underwrite in his own name at Lloyd's, or empower another person to underwrite for him at Lloyd's.
3. All underwriting business transacted at Lloyd's shall be conducted in the underwriting rooms, and not elsewhere.
4. An underwriting member shall not, by himself or by any partner or other substitute, directly or indirectly underwrite in the city of London a policy of insurance, as follows:—
 - (1) In the name of a partnership, or otherwise than in the name of one individual (being an underwriting member of the society) for each separate sum subscribed; or,
 - (2) For the account, benefit, or advantage of any company or association, unless they are subscribers to the society, nor unless every policy underwritten for their account, benefit, or advantage is underwritten in their ordinary place of business.
5. A member shall not open an insurance account in the name of any person not being a member or subscriber.

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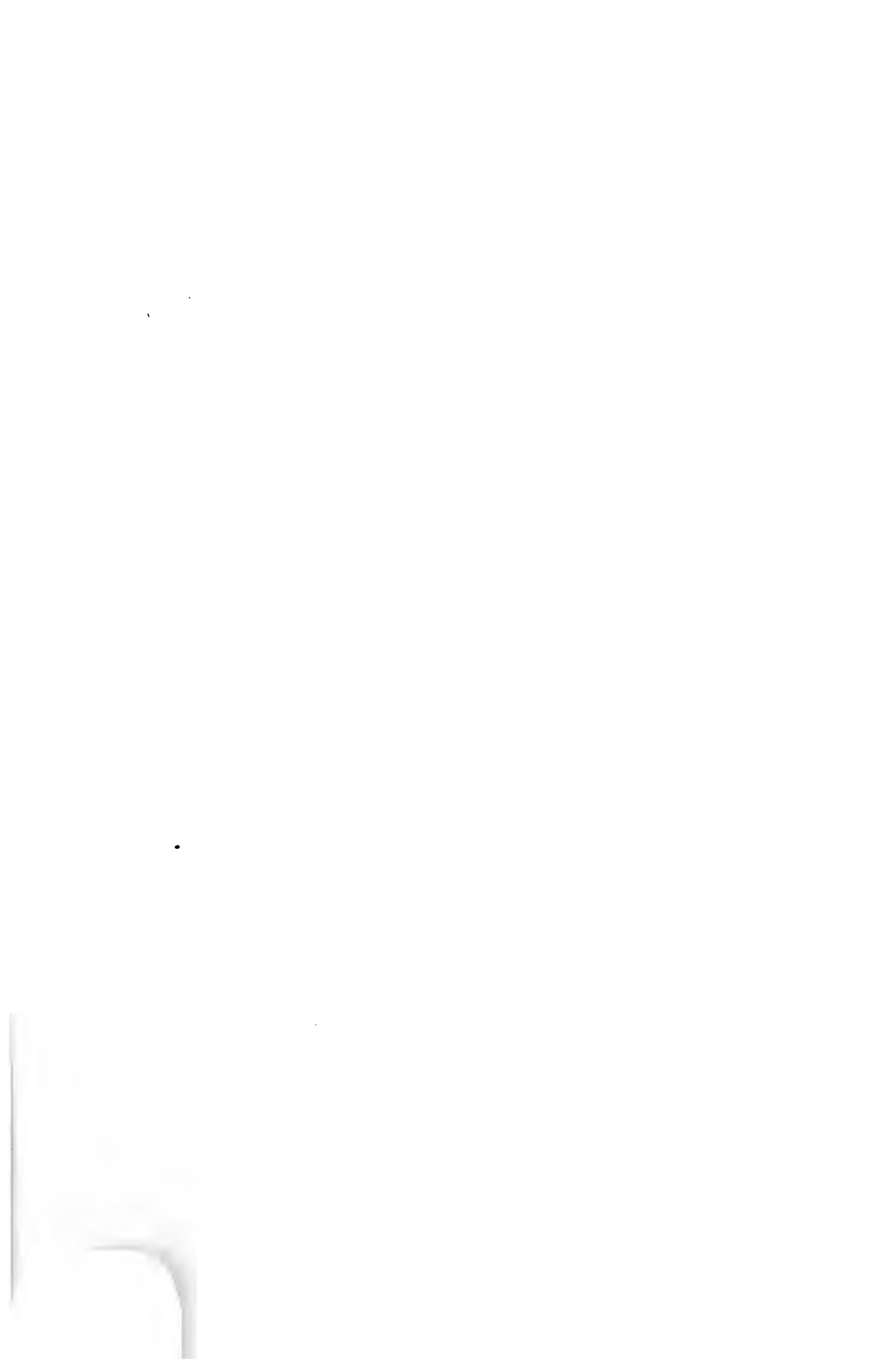
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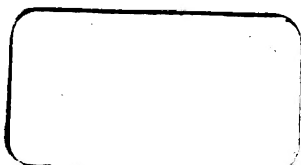
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